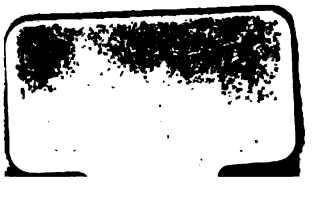

DECISION

OF THE

SUPREME COURT, VICE-ADMIALTY COURT

AND

BANKRUPTCY COUT

OF

MAURITIUS.

ARRÊTS

DE

LA COUR SUIRÊME, DE LA COUR DE VICLAMIRAUTÉ

ET DE LA

COUR DES FAILLITES

DE

LILE MAURICE.

1874

VOLUME THIRTEENTH.

EDIED BY H. LE MIÈRE.

BARRISTER-AT-LAW.

MAURITIUS:

PRINTED BY E. DUPUY,—9, BOURBON STREET

1875.

SUPREME COURT OF MAURITIUS.

His Honor Sir C. FARQUHAR SHAND, KNT., L.L.D. &c., Chief Judge,
The Honorable N. G. BESTEL, First Puisne Judge,
The Honorable JOHN GORRIE, Second Puisne Judge.

The Honorable G. B. COLIN, Procureur and Advocate General.
L. COX, Esq., Acting Substitute Procureur General.

VICTOR ESNOUF, Esq., Master,
J. A. ROBERTSON, Esq., Substitute Master.

O. D'EMMEREZ DE CHARMOY, Esq., Registrar.
L. ISNARD, Assistant Registrar

VICE-ADMIRALTY COURT.

His Honor Sir C. FARQUHAR SHAND, L.L.D., Chief Justice, Judge,
The Honorable N. G. BESTEL, Judge Surrogate,
E. J. LECLÉZIO, Esq., Queen's Advocate,
G. A. RITTER, Esq., Registrar.
JAMES BROWN, Marshall.
J. BOUCHET, Queen's Proctor.

COURT OF BANKRUPTCY.

JUDGES:—THE JUDGES OF THE SUPREME COURT
J. HERCHENRODER, Esq., Official Assignee.

COUNSEL (actually practising)

Leclézio, E,	1828	Florent, E	1865	Forget, A.	1870
Bazire, E	1858	Desmarais, E.	1866	Thibaud, L. A.	1871
Leclézio, E J. Hon.	1858	Bazire, E.	1867	Desenne, O	1871
Pellereau, E.	1860	Galéa, H.	1867	Boucherat.	1871
Martin Moncamp, P. G	1861	Lemière H.	1868	Gallet E.	1871
Rouillard, L	1861	Avice, H.	1868	Mathews, L. F.	1872
Chastellier, P. L	1864	Beaugeard, P.	1868	André A.	1872
Delafaye, V.	1864	Pilot, G.	1868	Pignéguy, J.	1873
Guibert, G.	1864	Vaudagne, E.	1868	Sauzier, A.	1873
Newton, W.	1864	Lionnet, F.	1870		
Lepoigneur, I.	1864	Ollier, R.	1870		
Jenkins, T. L	1865	Poulin, F	1870		

ATTORNIES (actually practising).

Pastor, E	1840	Tessier, G	1860	Desjardins, E.	1870
Mercier, J.	1840	Victor, F.	1860	Rousset, C.	1870
Lalandelle, G.	1842	Mallet, F.	1861	Wohrnitz, L.	1870
Hewetson, W.	1846	Ducray, V. G.	1861	Erny, P. J. A	1871
Laurent, E.	1846	Gautray, C.	1861	Rolando, A	1871
Ducray, E. Hon.	1848	Sicard, N.	1862	St. Pern, L. de	1871
Hitié, U.	1850	Simonet, F.	1863	Ganachaud, E.	1871
Pignéguy, J.	1850	Pitot, A	1863	Elie, J.	1871
Pastor, H.	1850	Bétuel, A.	1863	Lastelle, F.	1872
Colin, A J	1851	Boullé, V.	1863	Leblanc, W.	1872
Guibert, J	1853	Rodesse, L. C.	1863	Margeot, E.	1872
Finniss, W.	1853	Ritter, G A	1864	Newton, G.	1873
Bouchet, J	1853	Perrot, A	1864	Arnal, C.	1873
Duvivier, Ed.	1853	Rohan, A	1864	E. Vaudagne	1874
Ackroyd, J	1859	Gilot, F	1865		
Desperles, L	1859	Halais, J.	1865		
Herchenroder, T.	1860	Sauzier, M.	1866		
Laval, V	1860	Sauzier, E	1866		
Chazal, P. E. de	1860	Commarmond, A	1867		

JUDGMENTS OF THE SUPREME AND OTHER COURTS

OF

MAURITIUS

EDITED

BY H. LE MIÈRE, BARRISTER-AT-LAW.

1874.

VICE-ADMIRALTY COURT.

—

MONITION, — BREACH OF CUSTOMS ORDINANCE, No 8 OF 1854,—BILL OF LADING,— "CONNAISSEMENT",—INVOICE,—BILL OF ENTRY, —"BONA FIDES", — FALSE ENTRY, — BILL OF SIGHT, — SEIZURE OF GOODS,— FORFEITURE OF THE SAME, — QUEEN'S WAREHOUSE, — AFFIDAVITS, — EVIDENCE,—COSTS.

Circumstances under which the Court decided that goods which are not properly described in the Entry with the character and circumstances, according to which they are liable to duty, are to be dealt with as goods taken or landed without due Entry, and to be held to be forfeited to Her Majesty, in virtue of Article 64 of Ordinance No. 8 of 1854.

—

LAISNÉ DE LA COURONNE, R. LE-TELLIER & Co.,—Claimants.

In re :

THE HON. THE COLLECTOR OF CUSTOMS,— Promovent.

versus

LAISNÉ DE LA COURONNE, R. LE-TELLIER & Co.,—Impugnents.

—

Before

His Honor Sir C. FARQUHAR SHAND, Knight, Chief Justice, Judge.

—

L. COX,—Actg. Subt. Proc. Gen.,—Of Counsel for Promovents.
J. BOUCHET,—Queen's Proctor.
W. NEWTON,—Of Counsel for Impugnents.
J. GUIBERT,—Proctor for the same.

—

12th January 1874.

This was an application by way of monition, in the Vice-Admiralty Court, concluding for the condemnation and forfeiture of sixty two cases liqueurs marked :

L R—50 1/50. L C T,—12. } seized by the Custom House Authorities for alleged breach of the Customs Ordinance No. 8 of 1854. Affidavits were put in, on both sides, and it appeared to the Court that the case was sufficiently disclosed, without farther procedure by way of libel or oral evidence, which would, necessarily, have led to considerable delay and expenses.

Counsel for the parties were fully heard.

It appeared from the evidence, that in the month of May last, the ship " Regina Cœli ", of Bordeaux, Pierre Messac, master, arrived in the harbour of Port Louis, having on board sixty two cases liqueurs, consigned to Messrs. Laisné de la Couronne, R. Letellier & Co. The Bill of Lading, " Connaissement' ', contained merely the marks and numbers of the cases, and the claimants deposed on oath, that, up to the present time, they had not received any Invoice (" Facture") informing them specially of the contents of the cases.

On the twenty second of May, the Marine Broker Théold Laurent, at the request of Fernand Letellier, a clerk of the claimants, passed the said goods at the Custom House by a " Bill of Entry " stating that each of the said cases contained one dozen bottles, measuring one gallon and seven eighths of a gallon per case. The Broker deposed that he suggested to the said Fernand Letellier the propriety of entering the goods by " Bill of Sight ", that the actual contents of the cases might be ultimately verified, but that the said Letellier declined to do this, and ordered the cases to be, at once, entered as containing twelve bottles, each of the above capacity.

On the entry so made, a permit to land was granted to the Broker. The landing commenced on the fourth of June, when about fifty of the cases were brought on shore, and placed in the Custom's Wharf. The same day, the said Fernand Letellier applied at the Custom House for a delivery order to send the goods into a bonded warehouse. Some of the cases were then opened and examined, and were found to contain a far greater number of bottles, and a much larger quantity of liqueur than was declared in the entry of twenty third of May The whole of the fifty cases were then opened, at the Queen's Warehouse, and upon examination were found to contain a quantity of liqueur far greater than declared. The remainder of the cases, twelve in number, were landed on tenth of June, and when opened, their contents were also found to be much in excess of what had been stated. Whereupon, the whole goods not being properly described in the entry with the character and circumstances, according to which they were liable to duty, were dealt with as goods landed without due entry, and were held to be liable to be forfeited to Her Majesty, in virtue of Article 64 of the Customs Ordinance No. 8 of 1854.

t

The enactments of the same law, chiefly bearing on the present inquiry, are Sections 17 and 18. The former is applicable to the case where the person entering the goods is able to make " a perfect entry ", containing a minute statement of all the information required by law, such as the name of the Importer, the name of the ship, the place whence the goods came, particulars of the quantity and quality of the goods, of the packages, their marks and numbers, their real invoice, value, &c., &c., &c. The latter section gives the mode of proceeding to entry by " Bill of Sight ", where the Importer for want of full information cannot make a perfect entry. The Collector is authorized to receive an entry in such cases " by the best description " which can be given, and to grant a warrant for the landing and securing of the said articles to the satisfaction of the Officers of Customs. Within three days after the landing, the Importer must make a perfect entry, and pay the duties : if this is not done, the goods are taken to the Queen's Warehouse, and, if perfect entry is not made within one month, and the duties paid, the articles will be sold and the overplus, if any, after payment of the duties and charges, will be paid to the proprietors of the goods.

It thus appears that the clerk and representative of the claimants adopted the wrong mode of proceeding, and entered the goods as much less in quantity than they really were. What explanation does he give of his conduct? We shall give it from his own affidavit. He says that, on or about the twenty second May, his employers handed to him the Bill of Lading in the absence of Mr. Charles Privet, the Customs clerk of the firm, and gave him the necessary instructions to fulfil, at the Custom House, the formalities required by law for the landing and warehousing of the goods ; that this firm, being in the habit of receiving brandy and liqueurs by cases of twelve bottles each, measuring one gallon and seven eighths of a gallon per case, and thereupon he, BONA FIDE, applied to Mr. Laurent, Marine Broker, and requested him to pass at the Custom House a bill of entry of sixty two cases liqueurs, as containing each twelve bot-

tles measuring one gallon and seven eighths of a gallon per case. That his employers were made aware by him, on the afternoon of the same day, that an entry had been made specifying that each case of liqueur contained one dozen of bottles, measuring one gallon and seven eighths of a gallon per case. That, on the very next day, in execution of the orders given to him by his employers, he informed Mr. Bradshaw, Landing-Waiter, that the entry above-mentioned contained certain specifications which might be proved hereafter to be untrue, and requested him, on behalf of his employers, to give the necessary directions in order that the said cases of liqueurs, when landed, should be brought to the Custom House to be there opened and examined by the competent authority, so as to verify the true contents thereof. That the cases were not landed before a fortnight from and after the day of the information given by the deponent to Mr. Bradshaw. That, when the cases were opened, they were found not to correspond with the particulars of the Bill of Entry.

Mr. Théodore Laisné de la Couronne, one of the claimants, deposes that the firm, having being informed by their clerk that, on his application, the broker had passed a Bill of Entry, specifying that each case contained twelve bottles, measuring one gallon and seven eighths of a gallon per case, the claimants, the next day, through their said clerk, informed Mr. Bradshaw that the specifications might hereafter prove to be untrue, and requested him to have the cases verified, &c., &c. That the claimants acted in good faith, and never intended to commit any fraud to the prejudice of the Revenue Laws.

The broker, as we have seen, deposes that it was in opposition to his suggestion that the entry was made by "Bill of Entry" instead of Bill of Sight.

Mr. Bradshaw deposes that it is false that the claimants or any person told him, previous to the examination of the cases of liqueurs, that the passing the goods by perfect entry was incorrect or expressed a desire to alter that entry. That, previous to the landing of the goods on fourth June last, he had not seen or spoken to, or otherwise communicated with the said Fernand Letellier. That he did not inform him (Bradshaw) that the description of the goods was incorrect, and that he desired in any way to alter the entry. That it was not at the request of the said R. Letellier that he ordered the goods to be examined, &c., &c.

Such is the position of the case in which we must now proceed to judgment.

The statements of the clerk Letellier are not confirmed by the other affidavits. On the contrary they are negatived, especially by Bradshaw, on their most important points. But, even were we to take Letellier's statement, as it stands, and put it in the light most favourable for him, there is a plain confession of gross and culpable negligence. He does not even allege that he gave Bradshaw, in writing, any correction of the blundering mode in which he had attempted to pass the goods by perfect entry. Who ever heard of the Officers of a Custom House, in the midst of their pressing and multifarious duties, being called on to attend to, and to act on such verbal corrections of written entries, as Letellier alleges.

Take the facts then, even on the showing of the claimants' own clerk, who acted for them in the matter, it is not easy to figure a case of more gross negligence, *culpa lata dolo æquiparatur*; such misconduct must carry with it its legal consequences. The Ordinance has been disobeyed in one of its most important parts, the goods have been improperly entered, the Public Revenue has been exposed to serious peril and the working of the Custom House must be protected.

On the whole matter, the Court must arrive at the conclusion that the goods in question were not duly described, they were not properly passed, and as such, they are, in law, by Article 64 of the Ordinance, goods taken or landed without due entry thereof, and must be forfeited.

The said sixty two cases liqueurs marked L R—50 1/50. L C T—12. 1 are now accordingly declared to be forfeited to the Promovent, as acting for the Crown. No farther penalty is asked for by the Promovent. The Claimants to pay the costs.

BANKRUPTCY COURT

BANKRUPT,—MOTION FOR A CERTIFICATE OF CONFORMITY, — REFUSAL OF THE SAME, — FALSE AND FRAUDULENT ENTRIES,—COURT OF ASSIZE,—CONVICTION, —ORDINANCE No. 14 OF 1864, SECTION 2 ARTICLE 11.

On the application of the bankrupt to have a Certificate of Conformity allowed him, the Court, in presence of the fact that the same bankrupt had been unanimously convicted, at the Court of Assize, of having wilfully and unlawfully made a false and fraudulent entry in a certain document, with intent to defraud his creditors, refused, in accordance with Section 2 of Article 11 of Ordinance No. 14 of 1864, the granting of the Certificate prayed for.

In re :

BANKRUPTCY OF HOSSEN HAJEE ISMAIL.

—

Before

His Honor Mr. Justice BESTEL, Judge Commissioner.

—

E. PELLEREAU,—Of Counsel for Bankrupt.
A. PITOT,—Attorney for the same.

HON. E. LECLÉZIO,—Of Counsel for the Official and Trade Assignees
E. DUVIVIER,—Attorney for the same.

—

16*th January* 1874.

Hossen Hajee Ismail through his counsel, Pellereau, moved that a Certificate of Conformity be allowed him. This motion was opposed by Leclézio, of Counsel for the Official and Trade Assignees on several grounds, amongst others on the ground of the bankrupt having been unanimously convicted at the Court of Assize, held in the town of Port Louis, in this Island, on the 1st of December 1873, of having on the 10th day of August 1873, in this District of Port Louis, in the Island of Mauritius, in contemplation of Bankruptcy and with intent to defeat the object of the law relating to Bankrupts, wilfully and unlawfully made and been privy to the making of a certain false and fraudulent entry on a certain document, with intent to defraud his creditors, to wit : the false and fraudulent entry of the name of one V. Appou on a cheque or order dated the 10th of August 1872, signed by the said Hossen Hajee Ismail.

Such conviction, duly proved as it has been, clearly shews the bankrupt to be a man unworthy of that degree of estimation which "ought to belong to one engaged in the transactions of commerce, or indeed in any other transactions of life." (Shelford's Bankruptcy Law, page 395, note P.)

I, therefore, order, in conformity with § 2 of Article 11 of Ordinance No. 14 of 1864, that the bankrupt do take nothing by his motion, and I, accordingly, wholly refuse the Certificate prayed for.

—

SUPREME COURT.

—

"SÉPARATION DE BIENS",—RULE,—INSOLVENCY OF THE HUSBAND,—NOTICES,—CODE OF CIVIL PROCEDURE,—CONCLUSIONS OF THE MINISTÈRE PUBLIC,—EVIDENCE.

—

DUHAMEL THE WIFE,—Plaintiff,

versus

DUHAMEL THE HUSBAND,—Defendant.

—

Before

His Honor SIR C. FARQUHAR SHAND, KT. Chief Judge and

His Honor Mr. Justice BESTEL, 1st Puisne Judge.

—

L. ROUILLARD,—Of Counsel for Plaintiff.
VOLCY DUCRAY,—Attorney for the same.

P. L. CHASTELLIER,— Of Counsel for Defendant.
G. A. RITTER,—Attorney for the same.

—

11*th February* 1874.

This was a Rule calling upon the plaintiff's husband to shew cause why judgment should not be signed against him for want of a plea to the declaration served upon him, praying for a separation of goods on account of the insolvency of him, the said defendant.

The evidence produced in this case, clearly, shews that the state of disorder of the husband's affairs is such as to imperil any marriage portion she may have had brought with her, when married to the defendant.

The several notices, required by the Code of Civil Procedure, having been posted up at the several places mentioned in that Code and having been published in the Government Gazette ever since November last, the Court, with the consent of the Ministère Public, makes the above Rule absolute, with costs against the defendant.

SUPREME COURT.

—

ACCOUNTS,—EXAMINATION OF THE SAME,—DOUBLE AND FRAUDULENT ENTRIES,—CREDIT AND DEBIT,—ARBITRATION,—UMPIRE,—AWARD,—"TIERCE OPPOSITION",—"RES JUDICATA",—ARTICLE 474 OF THE CODE OF CIVIL PROCEDURE,—REFERENCE TO THE MASTER TO COMPUTE ACCOUNTS,—COSTS.

Held by the Court that the rights of the plaintiffs, who were perfect strangers to the judgment of reference of the 20th November 1863, could not be affected by the proceedings before the arbitrators and umpire, though made a Rule of Court, and that they were perfectly entitled to obtain a judgment which might warrant the Master to travel into the examination of the accounts "anterior" to the umpire's award, together with the LATER *accounts since such award, as there was undoubtedly "Res Judicata" as to the parties to the reference, but certainly not as to the plaintiffs and defendants in the present action*

Parties referred, in consequence, to the Master to compute the accounts as prayed for. Costs reserved.

—

BOULANGER & WIFE & ANOTHER,—Plaintiffs,

versus

HEIRS DANIEL MARTIN & OTHERS.—Defendants.

—

Before

His Honor Sir C. FARQUHAR SHAND, Knight Chief Judge and

His Honor Mr. Justice BESTEL, First Puisne Judge.

—

L. ROUILLARD,—Of Counsel for Boulanger & Wife, and another.
P. L. CHASTELLIER,—Of Counsel for A. Robert & others.
G. A. RITTER,—Attorney for the same.

G. GUIBERT,—Of Counsel for Defendants.
J. GUIBERT,—Attorney for the same.

—

11th February 1874.

By judgment of this Court of the 7th of October 1872, made between Widow Bussié and others plaintiffs *v.* Alfred de Rochecouste and others and Widow and Heirs, under benefit of inventory, of Daniel Martin, it was found that Daniel Martin, under a judgment of reference, made a Rule of Court of the 12th of December 1865, had been in his lifetime in possession of the "Guildiverie Centrale" at Mahébourg, in the district of Grand Port. That possession had been retained by his Widow and representatives to enable them to work off Martin's debt. The Court next found that the then and now plaintiffs were then in a position to insist on an inspection of the accounts of Widow and Heirs Martin, with the view of ascertaining what was the state of those accounts at the date of the 7th of October 1872 and remitted to the Master to examine the accounts of Martin in presence of the plaintiffs, and to state the balance, whatever it might be, as at the date of the judgment.

On the 12th of May last, the parties appeared before the Master, when Rouillard, of Counsel for the plaintiffs, moved that all the former accounts furnished by the late Martin, PREVIOUS to the award of Jules Chauvin, be re-examined before the Master upon the objection of the plaintiffs, as also the NEW accounts deposited by the Widow and Heirs Martin in this cause, starting from the date of the said award; the remit by the Court being the examination of the accounts of Martin, without ANY EXCEPTION, in order to arrive at the balance that was due as at the present date to Widow and Heirs Martin, especially as Chauvin had held the accounts laid before him as just and correct, "sauf erreurs ou omissions", and delivered his award "sous la réserve des droits de toutes les parties."

GUIBERT, of Counsel for the defendants, contended, on the other hand, that the accounts anterior to the award of Chauvin, the umpire, had been fully examined by the Arbitrators, their correctness affirmed by the latter, and sanctioned by the umpire, whose award was subsequently affirmed without any reservations of the Supreme Court and made a Rule of Court. That the Supreme Court never intended to re-open the discussion upon the accounts anterior to Chauvin's award, but merely wished to know, after examination of the new accounts furnished by Widow and Heirs Martin, since the award, the final balance which may be due, as at the present date, to Widow and Heirs Martin, who have been allowed to retain possession of the "Guildiverie Centrale" to work off Martin's debt fixed by the above award and judgment.

The Master ruled in the sense advocated by Guibert, and, accordingly, examined the new accounts furnished by the Widow and Heirs Martin (2 in number), from the date of the judgment of the 12th of December 1865 and arrived, as best he could, at a certain balance in favour of the Widow and Heirs Martin. Against the finding of such balance the plaintiffs raised certain objections which the Master declined entertaining for the reasons assigned by him, and the plaintiffs were directed to bring the present action before the Court to obtain from us a judgment which might warrant the Master to travel into the examination of the accounts, ANTERIOR to Jules Chauvin's award, along with the LATER accounts since such award. The demand now before the Court concludes with the prayer that the Court do order that the aforesaid accounts, the balance whereof has been found by the umpire Chauvin to amount to the aggregate sum of $19,040.94, errors and omissions excepted, be rectified by striking out from the debit side thereof, at their respective dates, the sundry entries which have been in the declaration averred to be double and fraudulent entries amounting to $6,424.51, and by adding to the credit side the sundry amounts which have been omitted in the said accounts and which ought to have figured thereon, amounting to the sum of $ 51,352, and that the Master do, upon the aforesaid rectifications, establish the real and true balance of the aforesaid accounts, and that the Heirs of the said Daniel Martin do pay the aforesaid balance with interest, and give up possession at once of the said "Guildiverie Centrale" with costs against Jules Martin and the other Heirs Daniel Martin, and to claim damages for all accounts, deeds, &c ,&c., of the said late Daniel Martin, specially for the state of bad repairs and condition in which the machinery, buildings, &c., &c., &c., of the said "Distillerie Centrale". Next follows a general traverse of the several facts and things in the declaration alleged, and especially the errors, double or false entries, alleged by the plaintiffs.

In their pleas, Edward Hart and Lisis Cantin say that they abide by the decision of the Court, claiming costs against the failing party or parties.

Alfred Rochecouste's plea is that he has nothing to say in bar of the plaintiffs' demand, as to the rectification of accounts, prayed for by plaintiffs against the "Guildiverie Centrale", on which points Rochecouste abides by the decision of the Court; asserts his non-personal liability to the plaintiffs or any other party for the debts of the "Guildiverie Centrale", and confines the exercise of the rights (if any) against the "Guildiverie Centrale" to the Distillery apparatus, and not upon the land and buildings which are the personal property of the said defendant Rochecouste. The plaintiffs, in their replication to the first plea of the Widow and Heirs Martin, re-asserted the formality and legality of this their action and joined issue.

Parties were heard, and the Court has now to give judgment on the several points argued, and chiefly on the propriety of ripping open all the accounts, whether anterior or posterior, to the finding of the umpire.

JUDGMENT.

The facts above stated, clearly, shew the parties to the suit, leading to the arbitration and final adjudication by the umpire, were not the same as in this action. The action, filed on the 9th of October 1863, was brought by Richard Ambroise Robert, against one Daniel Martin and the object thereof was to obtain from the latter an account of the sums received by Daniel Martin from the sale of a large quantity of Rum consigned to him by the said Robert, from the "Guildiverie Centrale", Mahébourg, in payment of certain advances made by Martin to the said Robert, for the working of the "Guildiverie Centrale", upon the condition, secondly, of accounting to Robert for any surplus over and above the repayment to Daniel Martin of all his advances to Robert. On the 20th of November 1863, an order of reference was filed between Robert and Daniel Martin, to which order, Alfred Rochecouste, Lisis Cantin, Paul Mollières, and Edward Hart, in their respective capacities of members of the Committee of Supervision and Control of the "Distillerie Centrale", were admitted as intervening parties.

The parties to that suit were, therefore, the plaintiff Robert, and the defendant Martin, plus the intervening parties just mentioned; they were the parties who appeared before the arbitrators and umpire, and were heard by them.

Whatever was decided by the arbitrators and finally affirmed by the umpire, and, subsequently, by the Court can apply to and be binding on no one but the parties to the reference.

It is not possible that the rights of the plaintiffs in the case now before us who are perfect strangers to the reference, should be affected by the proceedings before the arbitrators and umpire, though made a Rule of this Court. There is undoubtedly "Res Judicata" as to the parties to the reference, but certainly not as to the plaintiffs and defendants in the action now before the Court.

The accounts furnished, discussed between Robert, Daniel Martin and the intervening parties before the arbitrators and umpire, were never examined, nor discussed by the plaintiffs in this case.

The correctness of the accounts before the arbitrators and affirmed by the umpire, could only be so found and affirmed as to the parties to the arbitration who alone had the right and opportunity of criticising those accounts, a right which could not be, by any possibility, exercised by the plaintiffs in this case.

This action, therefore, though not so in terms, is in fact and in law, neither more or less than a " tierce opposition " to the judgment arbitral which is sought to be enforced against the plaintiffs, so as to shut them out of the possibility of examining or criticising the accounts furnished by the defendant in a quite different suit between the defendant Martin, Robert and other parties, to which suit, however, as already observed, the plaintiffs were no parties in person, nor were they, nor could they be represented on the reference by any of the parties thereto, whose interest were in the first place adverse to those of the plaintiffs in the cause now before the Court, and secondly, the plaintiffs in this cause do not derive their rights from any of the parties to the reference. (Article 474, Code of Civil Procedure.)

That the accounts sought to be examined should be laid before the plaintiffs, that their correctness, as to them, should be enquired into between the parties to this suit on the one hand is but fair; whilst, on the other hand, the examination applied for can in no wise shake the decision of the arbitrators and umpire, as to and between the parties to the reference.

We, accordingly, order that judgment be signed for the plaintiffs in this case. Parties are, accordingly, referred to the Master to compute the accounts as prayed for. Costs reserved.

BAIL COURT.

—

APPEAL FROM A JUDGMENT OF THE DISTRICT MAGISTRATE OF SEYCHELLES,—TRESPASS,—" DROIT DE PASSAGE ",—SERVITUDE,—ARTICLE 691 OF THE CIVIL CODE,—WITNESSES,—GENERAL EVIDENCE ACT, No. 7 OF 1871,—WRITTEN JUDGMENTS IN APPEALABLE CASES,—REGISTRAR'S MINUTES,—REMIT TO THE MAGISTRATE,—COSTS.

This was an appeal from a Judgment of the District Magistrate of Seychelles on a question of trespass. The defendants, now respondents, pleaded the general issue and also the special plea that they had a " droit de passage " on the plaintiff's Estate, but the Court found itself in the impossibility of deciding, in the absence of any written judgment on the part of the District Judge, whether the judgment had determined that the road in question had been lawfully dedicated to the service of the public, or whether a true appreciation had been made of Article 691 of the Civil Code which treats of the prescription of certain servitudes.

In the course of the evidence a question arose as to the admissibility, as a witness, of a relative of the plaintiffs; the Magistrate ruled according to Article 268 of the Code of Civil Procedure, but as that article had been repealed by Ordinance No. 7 of 1871 (vide Lapeyre's Reports, 1873, Nayeon v. Petit, page 76) the Court sustained, in presence of that fact, the appeal sending back, however, the case, with instructions to the Magistrate to hear the witness he had rejected and give a written judgment on the whole case.

—

BELMONT & ANOTHER,—Appellants

versus

THOM: ROSALIE & ANOTHER,—Respondents.

—

Before

His Honor Mr. JUSTICE GORRIE, Second Puisne Judge.

—

P. L. CHASTELLIER,—Of Counsel for Appellants.
G. A. RITTER,—Attorney for the same.

L. ROUILLARD,—Of Counsel for Respondents.
A. DE COMMARMOND,—Attorney for the same.

—

11*th February* 1874.

This is a case where the plaintiffs, who reside at Seychelles, sue the defendants, also residing in the dependencies, for trespass on a road which they allege belongs to them and passes through their property, and where the defendants plead the general issue, and also

a special plea that they have a legal right of passage on the estate of plaintiffs.

Evidence was heard by the District Judge and he had apparently visited the locality, and no doubt, was well informed on the subject in dispute. He has decided in favour of the defendants; but, following what we have already seen in other cases to be a practice not unusual with the District Judge, he has given no reasons whatever for his judgment. It is impossible for this Court to exercise aright its power, as an appellate Tribunal, when the District Judge gives no written judgment, setting forth the grounds of his decision; and, as we have already publicly taken notice of this omission, we can only come to the conclusion that our wishes in the matter had not been communicated to the learned gentleman who, at present, fills the office.

The parties usually take from the Registry only the accessory extract from the Registrar's minutes which enables them to enforce the judgment, and as the printed reports of our judgments have been much in arrear, it may well be that the learned gentleman has not been aware of what has been done. To prevent any doubt, hereafter, on so important a matter, I have to beg Her Majesty's Procureur and Advocate General to communicate to the District Judge of Seychelles the views of this Court, as to the necessity for written judgments in all appealable cases.

I am not able to say whether the judgment has determined that the road in question had been lawfully dedicated to the service of the public, or whether the District Judge has considered the evidence as establishing a servitude before the promulgation of the Law of the Code, or whether he has rightly appreciated the article 691 which treats of the prescription of certain servitude.

A question arose in the course of the evidence as to the admissibility, as a witness, of the aunt of the plaintiffs, and the learned Judge ruled she was not admissible. But as we have already decided in another case from Seychelles that the article of the Code of Civil Procedure, upon which this decision was based, has been set aside by the recent Evidence Act, I sustain the appeal against the judgment; but in the meantime without any finding as to costs, and remit the case back to the District Judge to hear this witness for the plaintiffs, and, after again hearing parties on the import of the new evidence, if they should so desire, to give a written judgment on the whole case.

SUPREME COURT.

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RECTIFICATION OF A DEED OF PARTITION,—DEMAND IN HOMOLOGATION OF THE SAME,—DIVISION OF PURCHASE PRICE,—PURCHASE OF PRIVILEGED CLAIMS,—LICITATATION,—"CAHIER DES CHARGES",—RESALE BY WAY OF "FOLLE ENCHÈRE",—LIABILITY OF THE "FOL ENCHERISSEUR,"—DEED UNDER PRIVATE SIGNATURES,—JUDICIAL SEQUESTRATOR,—AGENCY,—CONSIGNMENT OF SUGARS,—REGISTRATION OF DOCUMENT,—CONSERVATOR OF MORTGAGES,—ORAL AND DOCUMENTARY EVIDENCE,—COSTS.—

The theory of the law, with respect to a "Fol Enchérisseur", is that he has to pay interest on his price, instead of being permitted simply to give an account of the profits, because he is looked upon as a possessor in "malâ fide," and that he must pay the difference between the price he offered and that obtained for the property, should the former be greater, as a punishment for his temerity in undertaking obligations which he could not fulfil; but the Court held that it would not apply, in presence of the facts of the case, such results to the defendant as her possession was a perfectly "bonâ fide" one, and that the temerity in regard to the resale was not on her side. The law further requires that the price, on the purchase under the "Folle enchère," should be treated as the only sale price of the property, and all the rights and claims adjusted accordingly, but to apply, in this particular instance, the rule made with a view to ordinary cases of "Folle Enchère," the Court was of opinion that it would only be opening up many questions which were entirely closed by the earlier partition.

After carefully taking into consideration all the facts of the case, the Court, looking at the sale to the plaintiff as a final act as regard the property, was of opinion that it could only be treated as if it had been a sale by which the defendant was to have been relieved of all the obligations in the deed of partition of 1863 *and the supplementary one, leaving however to the plaintiff her right to exercise any recourse she may have against other parties.*

With respect to the sum of $90,000, *set apart in the first partition on behalf of the Defendant, the Court thought it unnecessary to make any further provision regarding it, as she is to be ranked from the* 20th *of October* 1864 *for her share of the succession, on the footing of the family compart, with the interest from that date, deducting therefrom, however, any sums paid by the plaintiff to the defendant; and directed, in consequence, the notary to pre-*

pare, in place of the deed of rectification which had been submitted to the Court for homologation, a new deed supplementary to the partition of 1863 *and relative amendment.*

Costs in the meantime reserved, to be dealt with when the new deed is submitted to the Court.

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WIDOW JAMIN & OTHERS,—Plaintiffs,

versus

BRÉARD & WIFE & OTHERS,—Defendants.

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Before

His Honor Sir C. FARQUHAR SHAND, Knight, Chief Judge, and

His Honor Mr. Justice GORRIE, Second Puisne Judge.

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Hon. E. LECLÉZIO,—Of Counsel for Plaintiffs.
EUG. LECLÉZIO,—Attorney for the same.

L. ROUILLARD,—Of Counsel for Bréard and wife.
G. GUIBERT,—Of Counsel for Lebreton and wife and others.
J. H. ACKROYD,—Attorney for Bréard and wife, Lebreton & wife & others.

—

11*th February* 1874.

This is an action to have a Deed, which forms the rectification of a Deed of Partition, homologated by the Court.

On 31st March 1864, the Court homologated and affirmed a deed of partition dated 20th November 1863, between the same parties relating to the same affairs, and also a supplementary deed of partition dated 23rd December 1863.

These deeds contained the division of the price of the Estate of "Savannah" which had been purchased some time before by Madame Bréard, one of the daughters of Mr. Jamin, the former owner of the Estate.

The deed, now before us for the purpose of homologation, has been rendered necessary by the subsequent resale of the Estate by the process of "Folle Enchère," and its purchase by Madame Jamin, the widow of the former proprietor, and the mother of Mrs. Bréard and the other heirs Jamin.

The Notary, in the deed now under rectification, has taken the former deeds as fixing the rights of parties in the community and succession of the late Mr. Jamin. He has further proceeded to treat Madame Bréard as an ordinary *Fol Encherisseuse* liable for the difference between the price offered by her, and the lower price obtained from Madame Jamin, and liable also for interest on the full price offered up to the date of the acquisition by Madame Jamin. As Madame Bréard had the Estate in her hands for four years, the interest at 9 o|o. thus stated against her, amounts to a very large sum. In addition, Madame Jamin had purchased up various bills issued by Madame Bréard for the working of the Estate, and which, owing to circumstances about to be explained, she had not been able to meet.

The whole of these are placed by the notary to the debit of Madame Bréard in a separate accounting with her mother Madame Jamin, with interest to date, and her rights in the succession are modified accordingly. This mode of dealing with her is objected to by Madame Bréard on various grounds which go back to the condition of the property on the death of Mr. Jamin, to the relative position of the parties at that date, and subsequently, and especially to the circumstances which resulted in the property being sold by "Folle Enchère" against Madame Bréard, and the purchase by Madame Jamin.

It is alleged by the former that, on the death of Mr. Jamin, the sugar estate of "Savannah" which is the largest, and one of the most profitable in the Island, was on the point of passing from the Family Jamin to other proprietors, who indeed had actually purchased it at the bar of the Master's Court on a sale by Licitation after the death of Mr. Jamin.

That Madame Bréard, acting as she alleges for the interest of the whole family, had then come forward, and by establishing a "surenchére" over the highest bid offered for the property, obtained the adjudication thereof in her own favour.

The price offered by her was $518,750 and 1,524,467 lbs. of sugar.

To show the relation in which she stood to Madame Jamin and the family at this period, she founds upon a document, which the Court by their judgment of 31st March 1864 decided ought to form the basis of the accounting between Madame Bréard as regards the first

partition, and those who signed it, viz: a private deed of 28th May 1860, the day before the adjudication to Madame Bréard.

The preamble sets forth:

"Nous soussignés, chacun pour ce qui "nous concerne, dans le but de favoriser "l'acquisition de notre propriété "Savannah" "à notre fille et sœur Marie Catherine Idalie "Jamin, épouse autorisée de Monsieur Ferdinand Bréard, et voulant lui donner une "marque d'amitié pour son dévouement dans "la défense des intérêts de toute la famille, "par la surenchère qu'elle a faite et qui produit à la succession de notre père et mari une "somme énorme de bénéfice réel pour nous, "déclarons par ces présentes, chacun pour "ce qui nous concerne, que nous entendons "abandonner et abandonnons à notre fille et "sœur Marie Catherine Idalie Jamin, épouse "autorisée de Monsieur Ferdinand Bréard "qui l'accepte, toute somme qui dépassera "le chiffre de $500,000 dans cette dite "acquisition de "Savannah."

"Dérogeant en outre aux termes du Cahier "des Charges de la dite vente de "Savannah," et chacun pour ce qui nous concerne, "nous entendons lui accorder et lui accordons "dix années pour le paiement de notre "capital, etc."

This deed was signed by Madame Jamin the mother, and by two of the sisters of Madame Bréard.

Madame Bréard had made arrangements with the mercantile house of Bergsten, de Courson & Co. for advancing a portion of the purchase price required as deposit, amounting to $129,000, and for taking the agency of the Estate for the necessary advances for the "entrecoupe," the sale of the sugars, &a.

Everything proceeded satisfactorily till February 1863, when the house Bergsten, de Courson & Co. stopped payment, and for the moment threw everything into confusion.

On the application of one of the creditors, a judicial sequestrator for "Savannah" was appointed on 6th February 1863. The person entrusted with this important duty was Mr James Edward Arbuthnot, then manager of one of the Loan Companies of the Colony, viz: The Ceylon Company, Limited, in his capacity of manager of the said Society. Mr Arbuthnot is now dead, but the Ceylon Company continues its operations in the Colony, and we have already had occasion to give judgment in a suit Mrs Bréard had instituted against the said Company.

The sequestrator received and dealt with the crop 1863-64, and that of 1864-65 was in the course of being reaped when, on the 29th of August 1864, steps were taken in the name of a creditor for a comparatively small amount, viz: Charles François, to complete a sale by "Folle Enchère" of the property because of the non-delivery of 81,174 lbs. of sugar. The amount of this claim was comparatively trifling, it having afterwards been sold by Messrs Thomas, Lachambre & Co., who had acquired it pending the proceedings, for £500. Mrs. Bréard alleges that the judicial sequestrator had abundant funds in his hands to have paid off this claim, and prevented the sale by "Folle Enchère," but that he did not do so, because he was in fact engaged in making arrangements with Mrs. Jamin and others for the purchase of the Estate by Mrs Jamin under the "Folle Enchère," in order that the Estate might be brought wholly, for a series of years, under the control of the Company of which he was the Manager.

Mrs Bréard asserts, moreover, that this was the attitude of the sequestrator at the very moment when an application was made on her behalf, on 6th September 1864, to have Messrs Richardson & Co., of Port Louis, appointed as sequestrators in place of Mr Arbuthnot. At the time, she was not able to lay before the Court the proofs of what was transpiring, and the Court was induced to continue Mr Arbuthnot as sequestrator. The result was the immediate sale of the property by "Folle Enchère" and its purchase by Madame Jamin with the money furnished by the Company of which Mr Arbuthnot was the manager, and by the Oriental Bank Corporation, the Bankers of the Ceylon Company.

So anxious, indeed, it is alleged by Madame Bréard, was Madame Jamin, or those who were acting in her name, to acquire the property, that they agreed to purchase from Messrs Thomas, Lachambre & Co. various privileged claims over the property, including that of François who was prosecuting the "Folle Enchère," and to give them a "bonification" of £1000, to induce them to transfer their rights; and also that a sum of £1,500 was paid to the attorney of Mrs Jamin, Mr Leclézio senior, and £500 to Mr Hewetson the attorney of Messrs Thomas, Lachambre & Co. and the Ceylon Company, in connection with the same transaction, the whole money being advanced by the Ceylon Company, of which Mr Arbuthnot, the sequestrator, was manager.

The proofs of these allegations, Mrs Bréard contends, are to be found in certain conventions put into process between the Ceylon

Company on the one hand, and Mrs Jamin on the other, and between these two parties and Messrs Thomas, Lachambre & Co. In particular she founds upon a convention between the first named parties dated 20th October 18 4, to which there is annexed a note of the sums to be advanced by the Ceylon Company for account of Mrs Jamin. The latter, showing the sum of £1,000 paid to Messrs Thomas, Lachambre & Co., and the "frais et honoraires" of £2,0 0 paid to the above named attornies, was given in to be registered on the same day as the convention. Indeed it is attached to the agreement, and necessarily forms an integral part of it, but nevertheless it was not copied in the Registry along with the principal deed.

The allegations thus made having been of a kind requiring immediate investigation, we ordered the examination, as witnesses, of the Conservator of Mortgages and his clerks, and found that although, by the practice and rules of the office, the appended note ought to have been copied in a Book kept for the purpose, that it was not so copied, and that the clerk whose duty was to have had it registered in full was dead. We have thus no positive means of ascertaining whether the document referred to was not registered by accident, by mistake, or by arrangement. It is of course impossible for the Conservator of Mortgages to superintend personally every document which enters his office, and every entry which requires to be made, and so far as his personal action in this matter is concerned, we see that he had improved the Register, by the addition of the Book in which the document ought to have been recorded, but was not.

However natural it may have been for Madame Bréard to put the worst construction on this document from the whole series of events preceding the purchase by Madame Jamin, it is necessary now to consider the explanations and contentions put forth on behalf of that lady. She contends that while it is quite true that she and other members of the family approved of the purchase by Madame Bréard, and were willing to make it as light as possible for her, by restricting the amount of their own claims, that the circumstances entirely altered when Madame Bréard could not fulfil the conditions of her purchase. Neither she nor the other members of the family could obtain payment of the interest on their claims, and in fact had nothing on which to subsist, that the offer of Messrs Richardson to become sequestrators was clogged with conditions which the other creditors could not accept, that the capitalists, who were disposed to assist in carrying on the Estate, had no confidence in the management of Mr Bréard and would not advance money, if he were to remain proprietor, and that all that was done by Madame Jamin in the arrangements to purchase the Estate was done in self-protection, to ensure that her own share of the property should not be lost or sacrificed. The alleged "bonification" or premium to Messrs Thomas, Lachambre & Co. was paid upon certain privileged claims, but that a large sum had been set aside on the former partition to provide for other claims, the exact figure of which had not been fixed, and that Thomas, Lachambre & Co. had purchased the first set of claims in the hope of obtaining more from the sum set apart; at all events that they, as the holder of the claims, refused to part with them without a premium.

To enable us to appreciate the worth of these explanations, it is necessary to keep in view the real position of the parties as it was disclosed before us in the oral evidence, and as it can be ascertained from the documents submitted. In the transactions which preceded and followed the purchase, Madame Jamin was represented by Mr Antoine de Mouhy, her brother, and her lawagent was Mr Leclezio senior.

Shortly after the sequestration, arrangements were in progress between the Oriental Bank Corporation and Madame Jamin for the acquisition of the property of "Savannah" by the latter, and the granting of the agency to the Ceylon Company. Annexed to a "transport" made by the Oriental Bank Corporation to Madame Jamin of 13th October 1873, there is a copy of an act made between M. de Mouhy and the Bank of date 20th October 1864, which mentions that a previous act "sous seing privé" had been made between Madame Jamin and the Bank of 21st May 1863 for the purpose of assuring to Madame Jamin the assistance of the Bank to enable her to acquire "Savannah," and that another act was made of the same date between Madame Jamin and the Ceylon Company to give the agency of "Savannah" to them if she should become the adjudicatee. The sequestration, which followed immediately upon the failure of Bergsten, de Courson & Co., was granted in February 1863, so that Madame Jamin or those acting for her, and in her name, did not allow three months to elapse before they endeavoured to acquire the property for her. The second convention to give the agency of the Estate to the Ceylon Company was made with Mr Arbuthnot the manager, who was himself the sequestrator of the Estate at the time.

When Madame Bréard applied for a change of sequestrator, Madame Jamin, or those acting in her name, supported the creditors who

objected to a change of sequestrator on the ground that the terms offered by Richardson & Co., were not so good as the existing arrangements, and that it was in the interest of the creditors to maintain Arbuthnot as sequestrator. The Court was not informed then, of the facts which we have learned in these proceedings.

We have, already, expressed during the discussion of this case our surprise and regret that the true state of the facts had not been laid before the Court, and we now repeat our feeling of dissatisfaction that so much which was material to the issue, was withheld from our cognizance. Within a few weeks of the judgment confirming Mr Arbuthnot as sequestrator, the sale by "Folle Enchère" at the instance of François took place. The sale had been fixed on the application of Mr Antony Colin, attorney, as acting for François, on the 29th of August 1864, but Mr De Mouhy, in his evidence, told us that the claim of François had been bought up by Maroussem, [the agent of Thomas, Lachambre & Co. in the Colony] who, he said, threatened to continue the "Folle Enchère." On the "Cahier des Charges" there is no entry that the claim of François had been assigned, and the same attorney appeared on the day of the biddings without any intimation of a change, although undoubtedly the claim of François had then been purchased by Thomas, Lachambre & Co.; and the Oriental Bank, for Madame Jamin, had arranged to purchase or had purchased it from the latter. Mr Hewetson, the attorney both for the Ceylon Company and Messrs. Thomas, Lachambre & Co. told us that these two companies had no competing interest in the matter. Indeed, that could not be, as Mr Hewetson received a sum of £500 from Madame Jamin, or at least from the Ceylon Company on account of Madame Jamin, to pay him for his joint services as attorney for Thomas, Lachambre & Co. and the Ceylon Company, so that it is impossible the interests of his two clients could be in competition. Mr. Hewetson, indeed, informed us further in the box that he acted in the affair as "negotiorum gestor" rather than as attorney; this was an unfortunate illustration, as the "negotiorum gestio" is a quasi-contract where one acts without having special authority to do so. Probably, Mr. Hewetson meant that he acted as a financial agent rather than attorney. It is, of course, open to any one to act as an "agent d'affaires" who pays the special license for this branch of business, but these functions are quite incompatible with those of attorneys. An attorney of this Court cannot escape from his professional responsibility by styling himself in his own mind by some other designation for the moment; such a doctrine would lead to the destruction of the profession of attorney altogether. We, accordingly, regard Mr Hewetson's action as that of attorney for his two clients already named. To return to the question of the interests of the parties under consideration, we further perceive that in the application made by Madame Bréard for a change of sequestrator, and when it was the interest both of Arbuthnot and Madame Jamin that no change should be made, it was Maroussem, the agent for Thomas, Lachambre & Co., who obligingly came forward with an affidavit on the occasion.

As the Ceylon Company was in accord with Thomas, Lachambre, & Co. and Madame Jamin was in accord with the Ceylon Company and the Oriental Bank, it perhaps mattered little whether the claim of François had been acquired in the one name or the other. If we are to believe the evidence, it was for a common interest.

It is true that Mr Hewetson in his evidence, and also Mr Leclézio and Mr de Mouhy, stated that Thomas, Lachambre & Co., wished themselves to become purchasers This does not seem to us quite consistent with the affidavit sworn by Maroussem, the agent of the Company, in the proceedings for the change of sequestrator. He then stated that the Estate was in such a condition that he would not even become sequestrator, and that his chief aim was to have the Estate sold, that he might get payment of his claims, and especially that Bréard should not be allowed to make any arrangements to hold the Estate.

If Mr Maroussem had been an old creditor of the property who had been kept for years, from getting payment by the action of Bréard, his desire to keep him out of the property could have been understood; but as he had only recently purchased the claims of Madame Hardy and of Mr Auguste Jamin for the sole purpose of having a finger in a pie whence he imagined there were some plums to be extracted, we cannot look upon his objections to Bréard in any other light than as adopted for a purpose. Moreover, if Maroussem had really wished to purchase the property, is it possible to believe that he would have sold his claims for £1000? The theory put forth by all the witnesses examined for Mrs Jamin on this point, viz: by de Mouhy, Hewetson & Leclézio, was that Thomas, Lachambre & Co. had purchased the claims of Hardy and Auguste Jamin because in the partition made on the occasion of the purchase by Bréard, a sum had been set apart to meet certain contested claims; and as Thomas, Lachambre & Co. considered these claims unfounded, they expected to have a share of the

money set apart. Law suits had actually begun to have these claims, or some of them, judicially determined, and in these law suits Thomas, Lachambre & Co. had entered themselves as defendants, and that consequently when they came to sell their claims to Madame Jamin they stipulated for a premium of £1000 at which they valued their chance of obtaining an addition to the rights of Hardy and Auguste Jamin. But these were not the only claims held by Thomas, Lachambre & Co. From a convention entered into between that House, the Oriental Bank and Madame Jamin, on the 20th of October 1864, it will be found that Thomas, Lachambre & Co. were the holders of other claims on the Estate. The numbers mentioned in the convention refer to "l'état ci-annexé", but no statement is annexed. There is, however, among the papers a document which was admitted by Mr Leclézio to be, without doubt, a copy or the Draft, or the actual statement referred to, and that shows seven claims in all as in the possession of the House, including that of François who sued the "Folle Enchère."

The contention at the Bar, on behalf of Madame Jamin, was that it was necessary for her to purchase these claims in order to have the chance of becoming a purchaser. Mr. Leclézio senior also gave evidence to the same effect. The explanation is that holding these claims, as they were privileged and in first rank, Madame Jamin could offer them as security to any capitalist who would lend her money But if this was a good reason for Madame Jamin, it was equally so for Messrs. Thomas, Lachambre & Co. if they wished to purchase, and the best of reasons why they should not have assigned them to a competing purchaser. They held such a position that they could easily thwart any one who had attempted to purchase "Savannah" on the "Folle Enchère". It is hard to believe, in these circumstances, that they wished to purchase at all, or if they had that they would have sold their rights for £1000; but we think the fact of Mr. Hewetson, continuing to act as agent both for them and for the Ceylon Company, who had already entered into arrangements for the agency, is conclusive that Thomas, Lachambre & Co. did not wish to become the purchasers, but were simply acting in accord with the Ceylon Company in bringing about such arrangements as would place the agency of the Estate wholly in their hands.

The position of Mr. de Mouhy and Mr. Leclézio senior confirms this view. Mr. de Mouhy, when in the box, was not very well able to explain why the £1000 was paid to Thomas, Lachambre & Co. He told us at first that it was to prevent the "Folle Enchère," but as it did not prevent the "Folle Enchère", and Madame Jamin purchased under the "Folle Enchère," that reason was evidently not a valid one. He attempted to give the same explanations as Messrs. Hewetson and Leclézio gave subsequently, that the premium had been given because of the possible addition to the rights of Madame Hardy and Auguste Jamin by combating certain disputed claims; but he may be excused for not being very clear on this subject, as one of those very disputed claims was his own for $50,000 as an alleged part proprietor by verbal contract in the Estate "Savannah". He had begun his action for this sum on 26th April 1863, immediately after the sequestration of "Savannah", and his attorney was Mr. Leclézio senior, who was also attorney for Madame Jamin. No defence was lodged for Madame Jamin, and, immediately after the property was bought by Madame Jamin, viz: on the 21st of October 1864, the action is marked as struck out.

The position of Mr de Mouhy was then a delicate one. In the arrangements with Thomas, Lachambre & Co., de Mouhy was acting as the mandatory and representative of Madame Jamin, who as one of the heirs Jamin had disputed his claim in the partition, and Thomas, Lachambre & Co. stipulated for a premium on account of the worthlessness of de Mouhy's claim. If de Mouhy, acting for Madame Jamin, refused to pay Thomas, Lachambre & Co. a premium on this head, that would be equivalent to saying that his own claim was good, and that the sum set apart in the partition would have to go to him and the others, and not to increase the rights of Mme Hardy and Auguste Jamin. On the other hand, to pay a premium would be to admit that his own claim was probably bad, and the sum set apart in the partition would, in all likelihood, go to increase the rights of the heirs.

If the position of Mr. de Mouhy was thus delicate, still more would have been that of Mr. Leclézio the attorney, had the claim of de Mouhy been at that time seriously disputed by his other client Madame Jamin. It is shewn however by the documents that the claim of de Mouhy had been already admitted by Madame Jamin. In the "transport" by the Oriental Bank to Madame Jamin of 13th October 1873 and in the first annex thereto, being the convention already referred to between Madame Jamin and the Bank on the occasion of her purchase of the property, it will be found that an act had been passed between de Mouhy and Madame Jamin of date 2nd May 1863, all mention of which, however, was carefully omitted from the Declaration which commenced de Mouhy's action where Madame Jamin was called as a Defen-

dant, as if things had remained intact on the footing of the partition. This act was confirmed on the day of the sale. By it Madame Jamin remitted to de Mouhy the full and entire administration of the affairs of "Savannah", and he, in his turn, engaged not to call up the capital of his claim before five years, the interest being meantime paid. Moreover, Madame Jamin bound herself to the Bank and to de Mouhy not to disturb him in this administration during the time necessary to realize six crops. The other claim of de Mouhy in right of his wife, that of the heirs Lecudenec, had been also arranged, as we find in the sums stipulated to be advanced after the sale by the Ceylon Company, the interest to the heirs Lecudenec is entered as one of the advances.

Mrs. Jamin having thus capitulated, Mr. Leclézio as her attorney, and Mr. de Mouhy as her administrator were more free to act. And the former told us in his evidence that he advised the payment of the £1000 to Thomas, Lachambre & Co. This appears somewhat peculiar when by the completed arrangements with de Mouhy, the rights of Madame Hardy and Auguste Jamin could not be increased, those of de Mouhy and heirs Lecudenec having been recognized as valid. But we are disposed to think that these gentlemen did not act so illogically as they thus represented themselves to have done, and that, whatever particular shape the negotiation took, the bonification paid on these particular claims was really to assist in the general results of the negotiation.

It is only necessary, now, to allude to the position of the Ceylon Company and the Oriental Bank in these transactions. The former, by its convention with Madame Jamin of May 1863, had showed its desire to obtain the agency of the Estate; and, immediately on the sale, a convention was concluded with Madame Jamin by which they advanced large sums of money and undertook extensive responsibilities. The Bank likewise agreed to advance $73,000, stipulating as one of the conditions, in addition to those already mentioned, that Madame Jamin should pay the bills of Bréard and wife which were in their hands, in consequence of the failure of Bergsten, de Courson & Co. As the repayment of the sum so paid by Madame Jamin is disputed by Madame Bréard it may be as well to quote here the article which embodies that part of the agreement:

"Moyennant cette assistance Madame Ja-
"min s'engage à payer à la Banque Orientale
"la somme de $56,700 montant en capital
"des billets actuellement dus par Madame
"Bréard à la dite Banque suivant état ci-
"annexé marqué A., plus celle de $1109.33
"payée par la Banque Orientale à la Banque
"Commerciale pour ses créances sur M. et
"Mme. Bréard, ainsi que les frais faits et
"honoraires encourus par la Banque Orien-
"tale comme créanciers de M. et Madame
"Bréard, lesquels suivant état examiné mar-
"qué B., s'élèvent à la somme de £537.0.6
"sans préjudice de tous autres frais que la
"Banque Orientale pourrait être appelée à
"faire jusqu'à parfait paiement de toutes ses
"créances pour la conservation tant de ses
"droits que de ceux de Madame Jamin."

The "Folle Enchère" which resulted in the sale to Madame Jamin was begun by notices in February and April 1864; the action by Mr de Mouhy against Madame Jamin was begun on 24th April 1864. The certificate from the Master, previous to the sale, was taken out in August 1864, the application by Bréard to the Court for a change of sequestration was in September 1864, the sale by "Folle Enchère" after Thomas, Lachambre & Co. had acquired the rights of François in whose name it was prosecuted was of 20th October 1864, and the various conventions between Madame Jamin (acting by de Mouhy) the Bank, the Ceylon Company, and Thomas, Lachambre & Co., were of same date (20th October 1864) following upon arrangements, according to the evidence of Mr. Leclézio, and the nature of things, made during the previous month.

From all these facts we can come to no other conclusion than that the whole arrangements which led to the sale of "Savannah" had for months been in progress between these parties, and that the leading object they had in view was to put Madame Bréard out and Madame Jamin in as proprietor of the Estate, with the view of obtaining subsidiary benefits to themselves; and that, notwithstanding the arrangement, sufficient for the interest of Madame Jamin, entered into by Bréard with Richardson & Co. and tendered to the Court.

The subsidiary benefits were to the Ceylon Company the continuance of the agency of the largest Estate in the Colony for a series of years, at a very high rate of remuneration, to the Oriental Bank the payment of Bréard's bills left on their hands by the failure of Bergsten, de Courson & Co., and their share in the business coming to the Ceylon Company; to de Mouhy the acknowledgment of his claim of $50,000, and the position of administrator of "Savannah"; to Thomas, Lachambre & Co. the bonification for their services of £1,000.

The attornies, as we have already seen, were not forgotten. In addition to the sum

paid to Mr. Hewetson, Mr. Leclézio senior obtained what he calls a " honorarium " of £1,500. He says that this was given to him freely and voluntarily by Mrs. Jamin, as a recompense for the care he had bestowed on her affairs for many years. But we find that Mr. Leclézio has been paid the usual professional fees for such services, which are those which it is the privilege and duty of attornies to give. In the first partition he is entered for the sum of $1,655, in the first account of the Ceylon Company with the " Savannah " Estate after the purchase, he is entered for $2,500, and in the "partage" now under homologation for $3,921.60. For the actions at the instance of de Mouhy and others he would also of course be paid. The " honorarium " of $7,500 which is said to have been voluntarily given by Madame Jamin, was paid to Mr. Leclézio from the first proceeds of the money advanced by the Ceylon Company, when Mrs. Jamin was not in a position to pay anything,—it was inserted in a convention written in his own hand, and if not stipulated for by himself must have been arranged for him by Mr. de Mouhy, whose claim of $50,000 had shortly before been admitted by Madame Jamin while Mr. Leclézio acted as the attorney of both. It is surely impossible for professional men not to see the grave suspicions to which the reception of such sums give rise, sums which are not in any sense proper professional charges, and which are still less in any proper sense the voluntary gifts of grateful clients; Mr Hewetson has told us that it is the practice for attornies to take such sums, and if so, there is an opening for the gravest abuses which demands the attention alike of the Government as of this Court. We must reserve for further consideration what course of action it may be our duty to adopt with respect to the actings of those members of the profession, now for the first time disclosed to the Court.

In the deed of partition which has been submitted for our homologation, Madame Bréard is treated as an ordinary " folle enchérisseuse," bound to pay the difference of price, and the interest on the price, from the day of her purchase until the new purchase by Madame Jamin. And in the accounting Madame Jamin is credited with the bills purchased from the Oriental Bank, and other bills, some of which were purchased by her for an insignificant sum, and of which she claims the full amount against Mrs Bréard with interest, which raises the whole to a crushing amount. These claims are not at all in the spirit of the Family agreement of 1860, and although Mr Bréard may not have been a satisfactory planter in the eyes of the Ceylon Company or the Oriental Bank, we could have wished that a deed of partition drawn up by a neutral notary should have shown a more just appreciation of the true position of parties.

We cannot look upon Madame Bréard as an ordinary "Folle Enchérisseuse" in an accounting with her mother, madame Jamin. A large sum towards payment of the purchase price was deposited by her at the time of the sale, the subsequent failure of the house of Bergsten, de Courson & Co. was a misfortune in no way attributable to her or her husband, and we may take the arrangement made with Richardson & Co., as a proof that Bréard had done all he could to retrieve his position; that, so far as the interests of the parties to the family compact of 1860 were concerned, he would have been able to resume payment of their allowances, and that in all likelihood before the ten years granted to him in that compact for payment of the capital had terminated, he would have been in a satisfactory position. The " Folle Enchère " at the instance of François, we look upon as having been virtually completed, by or on account of Mrs Jamin herself, Thomas, Lachambre & Co. having purchased the claim of François, and arrangements having been made before the sale for the purchase of the claim by the Oriental Bank, and Madame Jamin having undertaken to reimburse the Bank for the advances made by it in these and other regards, as is fully set forth in the Partition before us. The question has not been raised whether the sale in such circumstances, with the creditor who might justly and lawfully sue a "Folle Enchère" bought up, and another creditor virtually substituted who was in a very different position, can be sustained. In the discussion before us it has been treated as a valid sale, but in considering whether Madame Bréard can be regarded and treated as an ordinary " folle enchérisseuse " as between herself and Madame Jamin, we cannot shut out from view such facts as those of which we now have cognizance, and apply to her the rigorous rules of law intended for other descriptions of cases, as if there had been no concert and no manœuvring to turn her out of the property. The hostile feeling which prompted these proceedings did not, in all likelihood, originate with Madame Jamin, altho' done in her name. In fact, from the explanations given at the bar, we are happy to think that the feelings of Madame Jamin, the mother of the unfortunate lady whose position was so completely changed by the failure of de Courson, are very different from those represented by the course of these affairs and the conclusions of the Partition. The theory of the Law, with regard to a "Fol Enchérisseur", is that he has to pay interest on his price instead of being permitted simply to give an account of the profits,

because he is regarded as a possessor in "malâ fide," and that he has to pay the difference between the price he offered and that obtained for the property, should the former be greater, as a punishment for his temerity in undertaking obligations which he could not fulfil. But viewing the facts as we do, we could not apply to Madame Bréard such results when we are of opinion that her possession was perfectly "bonâ fide", and that the temerity in regard to the resale was not on her side. Moreover, the interest in this Colony is so high that the penalty comes in this case to be a very serious one, and in the view of equity, quite disproportionate to the relative position of parties.

The law requires also that the price on the purchase under the "Folle Enchère" shall be treated as the only sale price of the property, and all the rights and claims adjusted accordingly. But in this case Madame Bréard paid a deposit of $129,000 on the occasion of the purchase, which was used in payment of creditors, and also during her four years proprietorship paid off other claims which were treated of and adjusted in the deed of partition of 1863, which with its supplementary deed has been approved of by the Court. To apply the rule made with a view to ordinary cases of "Folle Enchère" would be to open up many questions which were closed by the earlier partition, and to interfere with the rights of others who are not before the Court, and with some who are only nominally before the Court, and have taken no part in these discussions.

The Notary has applied the ordinary rules of "Folle Enchère" to Madame Bréard, in charging her with the difference of price and interest on the price; but he has not taken Madame Jamin's price as the only sale price, nor regarded Bréard's purchase as completly null; on the contrary he has taken the first partition as his starting point, and the price of Bréard as a valid price legally partitioned.

While we are indisposed to lay upon Madame Bréard the penal consequences of a "Folle Enchère," we on the other hand perceive the difficulties which would arise by treating the price of Madame Jamin as the only sale price, and thus setting aside all the arrangement of the partition of 1863.

The same objection would apply were we to treat the four years' proprietorship of Bréard as a "bonâ fide" possession, simply requiring him to give an account of the fruits. This would involve additional difficulties from the fact that these questions have come before us in various shapes, and that in other cases Bréard has been treated as the person to whom an account of the sequestration up to 20th October 1864 should be made as the virtual owner up to that period.

After carefully considering all the methods which occurred to us calculated to do justice between the parties, we have come to the determination that looking at the sale to Madame Jamin as a final act as regard the property, that in a question of accounting beween Madame Bréard and herself it can only fairly be treated on such a footing as if it had been a sale, by which Madame Bréard was to be relieved by Madame Jamin of all the obligations in the deed of partition of 1863 and supplementary deed, with the addition of ranking Madame Bréard herself in her proper order as a creditor for her share of the succession calculated on the basis of the family compact of 1860. This necessarily implies that Madame Jamin shall have no claim on Madame Bréard for the bills paid to the Oriental Bank, because these liabilities were purchased by Madame Jamin as part of the arrangement which enabled her to turn Madame Breard out, and the latter when deprived of the Estate under the circumstances adverted to, having no means to pay the bills, it would be unjust to leave her under the crushing burden of the principal of these claims, some of which were bought up cheap, and the interest which even for the prescriptive period would be very heavy. Any recourse which Madame Jamin may have against other parties than Madame Bréard and her husband, is of course left open to her.

It will not be necessary to make any further provision in regard to the sum of $90,000 set apart in the first partition, as Madame Bréard will be ranked from the 20th October 1864 for her share of the succession on the footing of the family compact, with the interest from that date, but deducting therefrom any sums paid by Madame Jamin to Madame Bréard by way of donation or as an alimentary provision. All other subsidiary questions discussed before us will be found to be solved by this principle.

We, accordingly, direct Mr Baissac, the successor of Mr Sauzier, the notary who drew up the deed now under homologation, to prepare in place of the deed of rectification and "Etat des comptes" now submitted, a new deed supplementary to the partition of 1863 and relative amendment, in which effect shall be given to this judgment, and upon the new deed we shall hear parties if they desire it.

We will deal with the question of costs when the new deed is submitted, but we may say that we shall expect a very great reduction in the bills now before us, and that we cannot allow further costs to those attornies who have already obtained so large "honorarium" for their services.

SUPREME COURT.

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RIVERS, STREAMS AND CANALS,—DAMS,—PRESCRIPTION, — "RIVERAINS",—ORAL AND DOCUMENTARY EVIDENCE,—SURVEYS,—NATURAL AND ARTIFICIAL SPRINGS,—"SOURCES", — ORDINANCE No. 35 OF 1863,—ART. 641 OF THE CIVIL CODE.

Held by the Court that certain springs, arising on defendant's Estate, were natural and not artificial ones, and that those springs, although natural ones, were not the sources of the "Belle Eau" River, in the sense of Article 21 of Ordinance No. 35 of 1863, which enacts that "all springs which are the sources either of any River, of any tributary of a River, or of any Stream, are public property as such River or Stream itself."

The Court, further, intimated its opinion that the defendants, after having thrown into the River and permitted to be enjoyed by the lower "riverains" the overplus of the water from the innumerable springs on their Estate, for a very long period, and during which prescriptive interests had grown up, had no right to take as their own, without the authority of the Executive Council, from the River itself any portion of the water whether it had been contributed from the springs on "Gros Cailloux" Estate or from the ancient bed above the springs. The defendants, in consequence, were ordered, forthwith, to remove the dam or construction complained of, and to leave the water of the "Belle Eau" to have a free course towards the property and canal of "Albion", without diverting any quantity of the said water into irrigation canals, or otherwise.

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CHAUVIN & OTHERS,—Plaintiffs,

versus

MÉRANDON & OTHERS,—Defendants.

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Before

His Honor Mr. JUSTICE BESTEL, First Puisne Judge, and

His Honor Mr. Justice GORRIE, Second Puisne Judge.

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P.L. CHASTELLIER,—Of Counsel for Plaintiffs.
G. A. RITTER,—Attorney for the same.

G. GUIBERT,—Of Counsel for Defendants.
J. GUIBERT,—Attorney for the same.

—

11*th February* 1874.

This is an action by which Chauvin and others, proprietors of the "Albion" Estate, in the District of Black River, complain against the defendants that they have unlawfully obstructed the bed of the River "Belle Eau", and praying the Court to decree 1o. that the defendants have no right to have or keep the dam, of which they complain, across the River, and to divert the water thereof from the bed of the River, or from the Canals of the plaintiffs; 2o. to order the defendants to break and remove the dam altogether within eight days after judgment, and, in default thereof, to authorize the plaintiffs to remove the same, and 3o. to condemn the defendants to pay to the plaintiffs the sum of $ 4000, as damages with costs.

The defendants plead that the dam complained of is not such a dam as the plaintiffs represent it to be, but that it is constructed of loose stone, and has remained in the same place for more than thirty years. But they raise the separate issue that they are owners of certain springs on "Gros Cailloux" Estate, the water from which, after serving to put in motion the water-wheels on their Estate, falls into the bed of the River "Belle Eau", and that the defendants, at a point a little lower down than their last water wheel, take back the water for purposes of irrigation by means of a canal which has existed for more than thirty years, without hindrance or opposition from the lower "Riverains". They further plead that they have caused no damage to the plaintiffs.

The parties having produced evidence, oral and documentary, they were heard by their Counsel, Chastellier and Guibert, on the 5th and 7th of November last.

The plea of the defendants that no alteration had been made in the position of affairs for thirty years was not seriously maintained, and the fact was taken as admitted that the River, at a point marked on the plan of Mr. Reid, the Government Surveyor, one of the witnesses, was at the time the action was instituted, either constantly or periodically more completely dammed than formerly, for the purpose of withdrawing the greater portion of the water into irrigation canals of the defendants.

Indeed, if this were not the fact, the contention of the defendants that the springs on "Gros Cailloux" are his private property, and that he only takes out of the River the water belonging to himself which he had voluntarily permitted to fall into it, would have no meaning; for, whatever may have been the exact amount of water taken hitherto, he has joined issue with the plaintiff upon the point that he is entitled to take as much out of the River as falls into it from the overflow of his last mill wheel, and that practically means that he has the right to the whole water in the River.

The defendants contend that the springs are their private property, on the ground, first, that they are artificial and not natural springs; second, that if natural, the law of 1863 has not altered the law of the Code which recognized natural springs as belonging to the proprietor on whose ground they arose; and third, that even if the recent law can be construed as altering the ancient law on this respect, that the rights of the defendants must be tested by the law which existed when he and his predecessors dealt with the water, erected the mills, and constructed the basins, and not to ruin him by a retroactive application of a law which was only made for the future.

The plaintiffs deny that these springs are artificial. On this point we have had evidence from two very competent authorities, Mr. Reid and Mr. Vandermeerch, that the springs are natural springs, and that where any artificial work has been done it has been for the purpose of leading the water into the artificial paths or canals made for it, in order to draw it off towards the reservoirs. Mr. Connal is of the same opinion, but, as he carefully pointed out in his evidence, his attention had been directed on the spot more to the direction of the flow of the waters to ascertain whether they were natural feeders of of the River "Belle Eau," and he could not speak with the same positiveness of the amount of artificial work done to the springs. Mr. de Joux, the Surveyor called by the defendants, gave evidence which is opposed to that of the gentlemen above named. On their attention being called to a spring in the neighbourhood which is admittedly artificial, called Emeric's spring or well, they were quite clear that the "Gros Cailloux" springs were something different; whereas Mr de Joux believes them to be of the same nature. He speaks of them being dug and blasted out of the rock. He only finds one natural spring in the three groups. But we regard as much more trust-worthy the evidence of Mr. Cummins, one of the former proprietors, who was also called for the defendants, who said that in certain seasons of the year the water of all the springs came to the surface, that the digging and blasting were to cause the flow of water to be more rapid, that these operations were not so deep as at Emeric, and that where the proprietors found the water oozing through the rocks they blasted the rocks to make the flow easier.

It results from the evidence of all the witnesses that the ground in the neighbourhood was of a marshy nature, full of springs, and that proprietors of "Gros Cailloux," most properly and industriously, in place of leaving the water, as it was in a state of nature, to be a nuisance and fruitful source of disease, collected it into numerous little canals, or runs of water which they directed towards basins, or mill-dams, and stored it there until it was needed for the purpose of turning the wheels of the Flour Mills which continue to exist on the property.

We are accordingly satisfied that these springs are natural springs, or in the language of the Code, "sources," and that they rise on the property of the defendants.

The next question, for consideration, is what is the law of the Colony in regard to springs of such a nature. It is to be found in Article 21 of the Ordinance 35 of 1863: "Any "one (except as after provided) who has a "spring in his ground, may use it, in or up- "on his ground, in whatever way he thinks "proper, saving and reserving any right "which any inferior proprietor shall have ac- "quired by title or prescription. This Ar- "ticle is subject to the following exceptions "and provisions, viz: 1o. All springs which "are the sources either of any River, of any "tributary of a River, or of any Stream are "public property as such River or Stream itself."

A great deal of the evidence in the case was with reference to the exception just quoted.

The plaintiffs maintain that the Ordinance of 1863 made a change in the law: that by the Code, Article 641, the proprietor of the ground where a "source" was found could use it at his pleasure, but that now springs which are the sources of any River, of any tributary of a River, or of any Stream are public property as such River or Stream itself. The words "Rivers and Streams" by the interpretation clause (Art. 84) are held to include all natural rivers of water or water-courses, and do not include any artificial water-courses. Hence, as the proof went to shew that the natural springs on "Gros Cailloux" would have found their natural outlet by the

"Belle Eau" River, the plaintiffs came to the conclusion that they are public property as the River itself. The argument was based, at least partly, on a misconception of the meaning of the exception to Article 21, and this doubtless arose from the use of the English word "source" in connection with a subject, where the old law dealt with the French word "source." In French the word has two senses, one technical which we would translate by "spring," the other figurative signifying a beginning which we would translate by the English word "source." The word in English is not usually applied when speaking of the particular fountain from which a stream may issue; the word "spring" is employed in preference, but it is often employed in a general sense, such as would include all the head-waters of a stream, however numerous the springs might be from which they issued, according to the figurative meaning of the French word "source." Now, it is in this general sense that the word is used in the exception to Article 21. By stating that all springs which are the sources of any River, Tributary, or Stream are public, the Legislator means that the head-waters, or head springs of the River, Tributary, or Stream, are public, even though these should be on the private property of an individual; but it does not mean that all springs which naturally belong to the water-shed of any River or Stream are public property, because then Article 21 would have no meaning, as all springs must belong, in one sense or other, to the general water flow of a country or locality.

We must point out, however, that our meaning does not go to the extent of holding that no springs whatever, occurring lower down a river than its own origin or fountain head, are public. Many springs are to be found in the actual beds of rivers. These, of course, cannot belong to private proprietors, and there is a test for those also which emerge lower down than the fountain head, but not in the actual bed, viz; whether these springs are the sources of any Tributary of the River, or of any Stream; keeping in view that "Rivers and Streams" include all natural Rivers of water and water-courses. The plaintiffs attempted to give the latter words such a sense as to include in water-courses, the courses of natural infiltration of the water below the soil, if it could reasonably be concluded that the River would be the ultimate destination of the water when left to itself. We think, however, "water-courses" must be held to mean, in the general case, the courses of water visible to the eye in which the infiltrations of the soil assume a tangible shape above ground; a stream or run of water, great or small, but at least a visible flow and not a subsoil percolation. We do not, of course, profess to deal, at present, with such cases as occur both here and at Rodrigues, where veritable streams have found an underground channel. With these, and indeed necessarily with all cases, we can only deal upon their own special merits. Marshes, for example, may, in some special cases, be in such a position towards a river, as to be not only the feeders of the river, but possibly the course by which the water reaches the river. We give no opinion upon general cases not now before us; but in this case, while we are quite satisfied from the evidence, that the springs belong to the general water-shed of the "Belle Eau," that is, that left to themselves the water, not absorbed by evaporation, would filter by innumerable veins into the "Belle Eau" directly or indirectly, we are also satisfied, indeed there was not a point upon which the evidence was more consistent, that this is no natural water-course, that the runs which now exist leading the water to the mill-dams are artificial, and that the marshy ground from which the springs originate is not in such a position towards the river as to require us to consider whether a natural water-course, in the meaning of the Ordinance, does not exist through the marsh itself.

We have thus far held, against the contention of the defendants, that the springs are natural springs, and against the contention of the plaintiffs that they are not the sources of any River, Tributary, or Stream; and, accordingly, that under article 21, as under the former law, they have rightly been used by the proprietors, in or upon their own ground, in the way they thought most advantageous to their own interest.

Does it follow that the defendants can continue to use the water as their own, after it has been thrown into the bed of the river?

The article 21, which gives the proprietor of the ground, where a spring rises, the right to use it on his ground, has a saving clause and, in this respect, it is identical with the Code, article 641, viz: "saving and reserving "any right which any inferior proprietor "shall have acquired by title or prescription."

The position in which the plaintiffs stand in that respect is that they are now the proprietors of three properties, all of which had rights to water from the "Belle Eau;" two of the properties from "prises d'eau" above the defendants' mills, and one of them, "Albion", from a canal below the mills. In addition, as lower "riverains," the plaintiffs have a right, by the special terms of the Ordinance, to a fair share of the water for irrigation and other purposes.

The history of the springs on "Gros Cailloux", as developed before us both by the witnesses and the documents produced, shows that for a time much beyond the prescriptive period the water of the springs, after having been used by the proprietors for their own purposes, had been left to flow into the river and that this was taken into account by all concerned, when dealing with the water higher up the river. Almost the total quantity of water in the channel of the "Belle Eau" had been granted by lawful authority to the canal "Belle Eau", and to the canal "Belle Vue", at the time when the surplus from the "Gros Cailloux" springs, after serving the purposes of the property, was cast into the bed of the river. The proprietors of "Gros Cailloux," when resisting efforts which were made to declare the springs public property, treated in their pleadings of the rights of the lower "riverains" to the surplus water as well understood and acknowledged by them. This is proved by document of date 19th March 1869, given in by them to the Land Court in defence of their rights.

Such was the state of affairs before 1856; but after that date, which is given by Mr. Cummings as the time when the third mill was built, the defendants by their own acts brought the water by canals down to the very brink of the bed of the "Belle Eau", where for their own convenience the third mill was placed, and there they threw the overplus of the water which moved the third wheel into the bed of the river itself,—and this continued till 1863 when the Ordinance was passed. The defendants had enjoyed the innumerable springs upon the property of "Gros Cailloux" for their own purposes; but, after that was accomplished, they had thrown into the river and permitted to be enjoyed by the lower "riverain" the overplus of the water for a very long period, during which prescriptive interests in the person of the plaintiffs or their predecessors, and interests, recognized by public authority, had grown up and been sanctioned, upon the footing, that the surplus of the "Gros Cailloux" springs formed part of the water of the "Belle Eau" below the point of junction.

By the Ordinance the Rivers and Streams of the Colony are declared to be public property, and no one is entitled, without the authority of the Executive Council, to turn aside any portion of the water. The defendants had clearly therefore no authority to take at their own hand from the river itself, even had these prescriptive rights not existed, any portion of the water, whether it had been contributed from the springs on "Gros Cailloux," or from the ancient bed above the springs. They have, however, as borderers, a right as well as the proprietors of "Albion" to a share of the water for the purposes of irrigation, and that right certainly is not lessened by the fact that the chief quantity of the water in the river comes from their own springs.

We, accordingly, order the defendants forthwith to remove the dam or obstruction complained of, and to leave the water of the "Belle Eau" to have a free course towards the property and canal of "Albion," without diverting any quantity of the said water into irrigation canals or otherwise.

As to the damages due by the defendants for their illegal dealing with the waters, we in the meantime suspend consideration thereof, for the purpose of affording both parties an opportunity of applying to the proper authority for a division of the river; and, on its being reported to us that a satisfactory scheme of division has been accepted and is in operation to regulate the rights of parties for the future, we shall be prepared to decide the question of damages, the "quantum" of which, if not necessarily, at least, in part, equitably, depends not merely upon the fact of the illegal damming of the river, but on the quantity more or less than their proper share which the defendants took possession of. We order that an account of the costs of the plaintiffs be given in, the whole question of costs and damages to be finally decided when we have before us a scheme of division, with the expense of putting it into execution.

SUPREME COURT.

APPEAL FROM A JUDGMENT OF THE MASTER, —"LOCUS STANDI",—PRELIMINARY POINT, —"ORDRE", —INTERVENTION IN THE SAME BY A CREDITOR,— PARTNERSHIP,— DEED OF SALE,—"OUVERTURES DE CRÉDIT,"— MORTGAGE OVER PARTNERSHIP PROPERTY,—COSTS.

In this case it was contended, on behalf of the appellant, that the Estate "Clarifond" had not been put in to the partnership by the two co-owners of the said Estate, but simply the working of it, so that each of the partners, as a joint-owner "pro indiviso," could legally mortgage his own share; and 2o. that, if the mortgage given by one of the co-owners was ineffectual "per se," it had been ratified and confirmed by the other partner and that this would cure all defects. The Court, however, ruled that a mortgage given by one partner over partnership property was null and

void to all intents and purposes and that it was impossible, looking at all the facts of the case, to find in the proceedings any thing at all approaching to a ratification on the part of the other partner.

Appeal dismissed with costs.

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CHARLES ROUGÉ,—Appellant

versus

THE CRÉDIT FONCIER OF MAURITIUS & OTHERS,—Respondents.

"Ordre Clairfond."

Before

His Honor Sir C. FARQUHAR SHAND, KT., Chief Judge and
His Honor Mr JUSTICE GORRIE, Second Puisne Judge.

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E. PELLEREAU,—Of Counsel for Ch. Rougé.
E. EDWARDS,—Attorney for the same.

G. GUIBERT,—Of Counsel for Ch. Mauvis, Théodore Vigier Latour, Poupinel de Valencé and wife, Edward Vigier Latour, Lodoïska Vigier Latour and Widow A. Duhamel.
J. GUIBERT,— }
A. ROLANDO,— } Attornies for the same.
V. DUCRAY,— }

P. L. CHASTELLIER,—Of Counsel for the Credit Foncier of Mauritius, Edward Hart and E. Basset.
J. PINÉGUY,— }
F. VICTOR,— } Attornies for the same.
M. SAUZIER,— }

H. GALÉA,—Of Counsel for E. Duval.
J. H. ACKROYD,—Attorney for the same.

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11*th February* 1874.

In this case there was a previous appeal bringing up the question whether the appellant, Charles Rougé, had a "locus standi," at all, in this case, and could, in any way, interfere in the distribution, by way of "Ordre," of the sale price of the Sugar Estate "Clairfond." His opponents maintained that he was in no respect a creditor of Alfred Besnard the seller of the Estate to Ernest Duval, who, in his turn, sold it to Charles Mauvis, and could not therefore interfere in the "Ordre." This question, though envolving enquiries into the merits of the case, was pressed upon the Master's notice as a PRELIMINARY point. He dealt with it as such, and, on the 6th of May last, issued a jugdment ruling that Rougé was in a position entitling him to discuss the collocations in the "Ordre." The case was then appealed to this Court. But it was ordered that it should be remitted back to the Master to exhaust the case by disposing of all questions, before a final appeal.

This has been done, and the case has returned to us under the present appeal, in which we have heard a very full argument from the bar.

The questions between the parties arise, as we have seen, in the distribution by way of "Ordre" of the sale price of the Estate "Clairfond." This property was sold by Ernest Duval to Charles Mauvis, on the 15th of December 1870, but the circumstances, out of which the disputes have taken their rise, are of a far earlier date.

It appears that in the year 1852, one Isaïe Duval was owner of this Estate "Clairfond." On the 20th of September of that year he sold, to Ernest Duval and to Alfred Besnard, two undivided thirds of the property. In the year 1863 (1st June) he sold the remaining third to the same parties, as "acquéreurs con-"jointement et indivisément pour un sixième "chacun." By the same deed the purchasers entered into a partnership in the following terms: "Ernest Duval et Alfred Besnard ac-"tuellement propriétaires par moitié indivise "chacun, du domaine de "Clairfond," ont "déclaré former entre eux une société civile "et particulière pour en faire l'exploitation;" the partnership was to last eight years.

On the 21st November 1871, Besnard sold to Duval his undivided half of the Estate. This put an end to the partnership. It has been shewn that in the interval, and while the partnership was in existence, Besnard had made himself a party to an Act, by which a credit was opened by Messrs. A. Edwards and J. Rougé fils, merchants of Port Louis, in favour of one Mélidor Chéron for the working of two Estates belonging to him called "Bon Accord" and "Mon Repos Giblot." In this deed it was set forth that Besnard had intervened and granted a special mortgage to the amount of $68,000 over his half of "Clairfond," in guarantee of the advances to be made, under the opening of credit. Much of the discussion in the present case has turned upon this deed of opening of credit. Its special terms and the precise in-

tention of parties under it have been anxiously canvassed. But, before noticing the terms of that deed more particularly, it is necessary to advert, for a moment, to one or two prior deeds to which Besnard, Chéron, Edwards and J. Rougé fils, were parties.

In 1863 (10th December) whilst Besnard and Chéron were joint-owners of the Sugar Estate " Bon Accord," each for one half, " *pro indiviso*," they procured an opening of credit for the sum of $55,000, and in 1865 (15th February) a second credit for the sum of $90,000 for the working of the said Estate.

In 1866 (21st February), two days before the opening of credit of 23rd February 1866 above referred to, Besnard sold his share of " Bon Accord " to Chéron at the price of $105,676 96. Chéron was to pay to Edwards and J. Rougé fils the sum of $6,837.15, being the share due by him of the amount of $136.756.30, owing to the same firm, under the said " ouvertures de credit " and the balance of the account current. On the 23rd February 1866, Edwards and J. Rougé fils acknowledged to have received from Mélidor Chéron the sum of $145,000, in discharge of both his and Besnard's obligation under both " ouvertures de crédit."

On the same day, as we have already seen, the new " ouverture de crédit " by Messrs. Edwards & J. Rougé fils was opened to Chéron. It is necessary to pay particular attention to its clauses and to see exactly what it sets forth. It bears the date of the 23rd of February 1866.

By the first article the house, A. Edwards and J. Rougé fils, opens to Mélidor Chéron " pour servir exclusivement aux frais d'entre- " coupe et aux besoins des propriétés *Bon* " *Accord* et *Mon Repos Giblot* " a credit of $111,000, payable by instalments at the terms to be mentioned on the receipts or " ordres " to be given by Mr. Chéron during the period of the " entrecoupe," expected to end in the month of June following. In that month the last instalment of $10,000 was to be paid.

Those advances were to be reimbursed by repayments spread over the period from the following October to February 1867, when the crop might be expected to be finished. Chéron bound himself " en outre à remettre à " MM. A. Edwards et J. Rougé fils, au fur " et à mesure des versements qu'ils lui feront, " des billets à ordre augmentés d'un escompte " au taux de chaque négociation et exigibles " dans les termes ci-dessus fixés. Lesquels " billets, causés valeur exprimée en ces pré- " sentes, ne feront qu'un seul et même titre " avec le présent contrat."

Chéron further engaged to consign the sugars for sale to Edwards and J. Rougé fils, to be sold by them to the best advantage,—the nett produce to meet the bills issued and this from the first of July 1866 when the crop might be expected to begin. The rates of brokerage, commission and expenses were fixed; after payment of which the nett produce of the sugars was to be applied to the payment of the bills and other obligations of Chéron as they fell due, and, particularly, to the wages of the " employés " and laborers, the annuities due to the companies of " Crédit Foncier," the balance remaining due to be at the disposal of Mr. Chéron, the accounts to be adjusted and settled at the latest on 15th of November 1867. By article 10 it was declared that: " pour garantir le paie- " ment tant des avances faites par MM. A. " Edwards et J. Rougé fils, que de tous bil- " lets faits en vertu des présentes (que ces " billets se trouvent entre les mains de MM. " A. Edwards et J. Rougé fils, ou de tous " autres tiers porteurs) avec ou sans l'endos " de MM A. Edwards et J. Rougé fils," Mr. Chéron granted a special mortgage over the Estates " Bon Accord " and " Mon Repos Giblot," which are described at length. Besnard's intervention is set forth in these terms: " En l'endroit est intervenu; M. Alfred Bes- " nard, propriétaire, demeurant au Port- " Louis; lequel après avoir pris lecture et " communication de l'ouverture de crédit qui " précède, a déclaré pour surcroît de garantie " s'obliger personnellement et solidairement " avec M. Chéron père, au paiement de la " balance de compte qui peut ou pourra être " due à MM. A. Edwards et J. Rougé fils, " et dont le chiffre sera établi par les comptes " que ces derniers auront à fournir, et par " suite affecter, obliger, et hypothéquer spé- " cialement par ces présentes en garantie du " paiement de la sus-dite ouverture de crédit, " jusqu'à concurrence de soixante cinq mille " piastres, au profit des dits MM. A. Edwards " et J. Rougé fils, ce acceptant, la moitié " indivise lui appartenant, l'autre moitié in- " divise appartenant à M. Ernest Duval, dans " les deux propriétés ci-après désignées, si- " tuées en cette Ile, au quartier des Plaines " Wilhems, et, actuellement réunies en une " seule et même exploitation, sous la dénomi- " nation de " Clairfond."

The existing partnership between Besnard and Duval " au sujet de laquelle propriété *Clairfond* " is noticed, and the responsibility of Besnard is thus defined: " 2o. Et entre " MM. A. Edwards et J. Rougé fils et M. " Alfred Besnard, que ce dernier ne pourra " jamais être responsable d'une balance de " compte plus forte que trente mille piastres, " à la fin de la présente coupe, (1866 à 1867) " et que, quelque soit la balance de compte,

" au quinze Février prochain, de M. Chéron " père, MM. A. Edwards et J. Rougé fils ne " pourront conserver contre M. Alfred Bes- " nard leur garantie hypothécaire sur la moi- " tié de *Clairfond* que jusqu'à concurrence " de trente mille piastres. Cette dernière " somme devant être au besoin réduite dans " le cas ou la balance de compte de M. Ché- " ron serait moins élevée."

Of the same date Messrs. A. Edwards and J. Rougé fils, with a preference against themselves, transferred to the Commercial Bank all their rights under this deed to the amount of $65,000. On the 21st of June 1866, Messrs. Edwards and J. Rougé fils conveyed by deed to Messrs. Plasson and Loustau Lalanne the agency of the said Estate ; a list of all the bills made by Chéron and endorsed by Messrs. A. Edwards and J. Rougé fils, including the bills now claimed by Charles Rougé, is annexed to this deed, to which Messrs. Chéron and Besnard are also intervening parties.

In February 1868, the above named Estates belonging to Chéron were sold against him by Forcible Ejectment. The Commercial Bank was collocated for the sums of $21,529.57 and $11,357.50 at the distribution of the price of both Estates, and for the balance of its claim it entered into a transaction with Duval and Besnard. A mortgage for the reduced sum of $6,000 was given by them on their Estate " Clairfond ", and it was convenanted between them that the Inscription on the half of the Estate " Clairfond " should be erased. On the 21st of November 1870, Besnard, as we have already seen, sold to Duval his undivided half of " Clairfond." On the 15th of December of the same year, Duval sold the whole Estate to Charles Mauvis for $120,000. This price is the subject of the present " Ordre."

In the suit now before us, Charles Rougé, the appellant, is holder, as a third party, of certain of the bills subscribed by Chéron and endorsed by Edwards and Rougé fils, under the " ouverture de crédit " of 23rd February 1866, amounting with interest to about $23,000. He contends that this debt is covered by the mortgage granted by Besnard under his intervention to the deed of opening of credit above noticed. On the other hand the respondents, in whose favour the Master has decided, are holders of delegations of portions of the sale price of the Estate " Clairfond " sold by Besnard to Duval, duly intimated to Duval, and now regularly intimated under the later sale by Duval to Mauvis. The appellant does not put forward his claim as a creditor of the owners of " Clairfond " directly, but he says that he has the benefit of the mortgage granted by Alfred Besnard on his one half of " Clairfond " which accrues, as he contends, to his, the appellant's benefit ; that this is a real burden on the lands which can only be sold under this encumbrance, in other words, that he is entitled to take rank by way of preference before the respondents on the sale price of the Estate.

For the appellant, PELLEREAU contended 1st ; the " ouverture de crédit " of 1866 was not merely for the balance which might be due on the account between Edwards and J. Rougé fils, and Chéron : it included the bills and promissory notes, which were subscribed by Chéron under it and forming one and the same title (reads the clauses of the Deed quoted above). These bills, in whatever hands they might legitimately fall, were covered by Besnard's mortgage.

2dly. The Estate itself was not put into the partnership by Besnard and Duval, only the working of it, so each of the partners, as a joint-owner "pro indiviso," could legally mortgage his own share.

4ly. Even if the Estate was put in the partnership, the mortgage over Besnard's half is effectual in my favour, after the several partnership debts are provided for : this would still give me a good position in the "Ordre," as I would come in after the " Crédit Foncier," and before the other claimants.

5ly. Even if the mortgage by one of the partners was ineffectual " per se," it was ratified and confirmed by the other partner and this would cure all defects.

6ly. When Besnard sold his share to Duval in 1870, it was said in the Deed that Besnard is paid off: but to pay him off without regard to my claims was to deprive me of my legal rights. I cannot be affected by such an act of fraud.

CHASTELLIER and GUIBERT for the " Crédit Foncier of Mauritius," Basset, Hart, Vaudières, Duhamel & Mauvis *contrà* : The " Crédit Foncier of Mauritius " paid off the debts of both parties, and it is entitled to take their place, they and the other claimants here ; Basset, Hart and others are " bonâ fide " onerous creditors and as such hold regularly intimated delegations of portions of the price, on the sale of the Estate " Clairfond " by Besnard to Duval, also intimated and accepted on the sale by Duval to Mauvis. The appellant, C. Rougé, is a creditor neither of Besnard nor of Duval. The fund belongs to them and to their creditors, and so Rougé is obliged to allege that he is indirectly a creditor of Besnard under the mortgage given by

him over his one half of " Clairfond." The whole case arises out of the " ouverture de crédit " of the 23rd February 1866 (reads its clauses, *suprà*). It was only the balance of the accounts for the coming " entrecoupe ", and not for any arrears, that was guaranteed to the extent mentioned by the intervening party Besnard, nor for the payment of special or individual bills. Rougé can have no higher rights than those of Edwards and Rougé fils, and they make no claim. It is not enough to allege that there are certain promissory notes outstanding; it must be shewn that there is a balance due on the account current, for all cautionary obligations are " strictissimi juris." (Dalloz, Priv. & Hyp. No. 1328. Cass. 12th January 1837. Piston's Reports: Paul *v.* Wilson and others, 1862, page 98.)

In truth, Edwards & J. Rougé fils were only the nominal parties in making the advances. It was the Bank which really found the money and it was for its benefit that all the stipulations took place. The Bank has been finally settled with, the mortgage has been struck out of the Records, and no one dreamt of any attempt to revive it till this suit was raised so many years afterwards, and the appellant has no case.

Counsel further contended that the mortgage is null and void as given by a single partner over his share of the company's property. It is said that the working of the Estate only and not the Estate itself was put in the partnership, I maintain the reverse. (Reads clauses of deed, suprà. Piston's Reports, 1865, p. 122; Brodie *v.* Bestel.)

As the mortgage was inept, it could not be homologated or ratified by any person. But in truth there was no homologation or appeal of it by Besnard's partner Duval. All that was done was this. By the act of 20th February 1869, between the Commercial Bank and Besnard and Duval, the Bank, expressly by way of transaction, got a good mortgage from the Company of Duval and Besnard over the whole Estate, for the sum of $ 6,000, transferring to Duval whatever right or action it had against Besnard, but without any guarantee whatever of the legal existence of any such right or action. So far from Duval ratifying and homologating the mortgage granted by Besnard over his half of " Clairfond ", so as to make it good over the whole property, the deed shews that all the parties to it were aware that it was worthless. 4th. It is alleged that the deed of sale by Besnard to Duval, dated 21st November 1870, was made in fraud of the rights of the appellant. This is incorrect. Besnard sold openly. If a fraud had been intended, the payment of the price would have been admitted, though not actually made, but on the contrary the price is declared payable at future and fixed terms; the deed was put in the public records, and the price might have been attached by the creditors of Besnard who, further, under Article 882 of the Code, had a right to be present at any division of property between Duval and Besnard and to protect their interests. This sale necessarily put an end to the society or partnership of Duval and Besnard; both parties were bound of course to pay their debts, and their creditors could attach their debtor's property. Besnard could assign the price or any part of it to his creditors, and this he did by accepted delegations to my clients. The appellant was no creditor of Besnard, and plainly nothing was done in defraud of his claim. If he was a creditor he could, in the usual way, have protected himself under the above article of the Civil Code. Even if there had been fraud, the respondents in no way participated in it, and it could not be pleaded against them.

5th. Lastly, as one of the proprietors was then purchaser under the sale by Besnard to Duval the latter is held in law to have been all along proprietor, and Besnard and all his acts connected with the Estate are effaced. Besnard's creditors could protect themselves under the article of the Civil Code above quoted; but no attempt was made to do this. (Marcadé, Vol. 3, Article 336. Paul Pont, Priv. & Hyp. Vol. 1, 643.) It is enough if the indivision ceases in any way. (Marcadé, ibid, 336; Paul Pont. ibid, 644: Demolombe V, 322 § 287: Dalloz, Succession 2078 & Seq. 2086.)

It may be said that the title of the seller and buyer had not a common origin. This is of no importance. (Demolombe p. 553; Flandin 133: S. V. 1851, 1, 7: S. V. 1857, 1, 665. That there was a sale, not an ordinary " partage ", makes no difference. (Hewetson *v.* Barry, 26th April 1872. Piston's Reports, p. 30: Demolombe, 282: Paul Pont, 283: Cassation 1856, 1, 47.)

PELLEREAU in reply. It is argued that the mortgage by Besnard is extinct as it was transferred to the Bank, whose debt has been paid. This is an error. The rights of Edwards & J. Rougé fils were transferred to the Bank up to the specified amount of $ 65,000, but Besnard's mortgage was for "any" $ 65,000. His mortgage was not limited to the Bank, it extended to every one falling within its terms, such as holders of the promissory notes issued in connection with it, irrespective altogether of the balance on the account current. The payment of the old balance out of the new *ouverture de crédit* was contemplated by all parties, and no one objected when it was done.

2nd. Besnard's mortgage is a valid deed. The theory of " être moral " in partnership is pushed too far on the other side. C. C. 2114. Troplong " Société " I § 70. The facts are opposed to the notion of a partnership in the land, the partners had been owners long before, but by titles of different origin : they write and act throughout as ordinary " pro indiviso " owners. Delangle p. 86.

3rd. There was no partition here, with its consequences, viz. : a " réglement " an " actif " a " passif " and a liquidation. There was only a sale. This makes all the difference. S. V. 1858. Cassation 3131 : Demolombe. V. 282. The notice in Article 882, C. C., is only sent when a death takes place. My opponents could only take rights from Besnard, subject to what he himself had done.

4th. The sale to Duval in 1870 cannot be opposed to third parties holding rights The new law of the Colony regulating transcriptions have swept away Article 883 of the Code. Demolombe, V. No. 312 : Troplong : Transcription, p. 35 : Piston's Reports 1864, p. 145.

The Procureur General gave his conclusions against the appellant.

JUDGMENT.

On the question which was argued in the outset before the Master and which was the subject of the first appeal, viz. : had the appellant Charles Rougé a " locus standi " as against the respondents, we think there is no room to doubt. It appears to us that on this point the Master's judgment was a sound one. Rougé is the onerous holder of a set of bills granted under the " ouverture de crédit " of the 23rd February 1866. The bills made in relation to that deed were, expressly, declared to be one and the same title with the deed itself, in whatsoever hands they were found. No doubt, in the deed in question, there is a difference in the terms of the obligation undertaken by Chéron and by Besnard. The undertaking of Chéron is broader than that of Besnard ; it is with the latter we have here to deal. He binds himself personally and solidarily with Chéron for the balance which is or shall be due to Edwards and J. Rougé fils, as shewn by their account, and farther grants a mortgage to guarantee payment of the " ouverture de crédit " up to the amount of $65,000, with certain limitations as to the sums to be ultimately paid by him. We think, looking at the words of the deed and the previous arrangements of the parties already recited, that the existing balance was properly carried to the new account by Edwards and J. Rougé fils. Again, the bills being declared to be one title with the deed itself, we are of opinion that they are covered by those undertakings on the part of Besnard, irrespective of the balance of the Bank's account. Besides, Besnard intervened in the notarial deed of the 21st of June 1866 transferring the agency to Plasson and Lousteau Lalanne, to which was annexed a list of the outstanding bills, among which those now claimed upon by C. Rougé did figure.

As to the alleged extinction of the mortgage by the erasure of the Inscription, this cannot affect C. Rougé who was no party to it, or to any of the arrangements leading to that result.

We are, therefore, of opinion that in this first question, C. Rougé, the appellant, must prevail. He is *primâ facie* a creditor of Besnard, and at least holds an apparent real security on his Estate of " Clairfond," and is fully entitled to be heard at the " Ordre " and dispute the accepted delegations and collocations on the sale price of that Estate.

Charles Rougé having thus the right and title to be heard in the present case, we must next enquire what are the pleas on the merits of his claim, with which his opponents meet his demand. Their leading arguments are of this nature.

They say the mortgage on which you take your stand is null and void. It is entirely inept and without value, having been granted by one of two partners over what is called his half or share of the partnership property. They contend that, standing the partnership, he had, individually, no power or capacity to deal with any part of his property or funds : that those are absolutely vested in the Company exclusively, that the Company being no party to the mortgage, that security was granted by a party who, in law, is quite a stranger to the Company's property with no right whatever to deal with any part of it. This proposition, in law, is contested by the appellant who maintains, 1st ; that the Estate " Clairfond " was not put in as part of the partnership property, and secondly that, even if it had formed part of the social stock, the mortgage is legal and effectual, or at all events that it secures his rights over Besnard's half of " Clairfond," after payment or extinction of all the debts of the Company, and that the application of the legal principle to this event would give him, the appellant, good position in the collocation of the sale price, now under distribution.

Let us examine those questions in their order.

1st. Was the Estate " Clairfond " put in the partnership formed by Duval and Besnard on 1st June 1863?

It will be remembered that on the 20th September 1852, Besnard and Duval purchased from Isaïe Duval, the then proprietor of " Clairfond," two undivided thirds of that Estate. Eleven years later, viz: on the 1st June 1863, they bought the remaining third. In this later deed of sale, a partnership was formed between them in these terms: " Messrs. " Ernest Duval and Alfred Besnard, the ac- " tual proprietors of the Estate " Clairfond ", " each of one undivided half, have declared " to form between them (hereby declare that " they form) a civil and private partnership " for the working of the said Estate."

The appellant says it was not the Estate, but only the working of the Estate which was put in as the stock of the partnership. This distinction appears to us somewhat subtle, and not easy to follow, looking at the actual position of the parties. They are joint proprietors of the Estate, each to the extent of one half. They formed a partnership of something or other; was it not the Estate which was made the subject of the partnership? They already were joint owners in possession of the property. If they did not intend to put the Estate in partnership, it is not easy to see what was the use of a partnership at all, or what could be object and subject of their society? The working of the Estate was already in their own hands, each for one half. If the Estate was not to be the subject of the new association, what did the parties mean and intend? No doubt, if their interest in the Estate had not been that of full property, we could readily understand their putting merely the working of it in the partnership. Had they been, for example, life renters or tenants in the subjects and had wished to form a partnership, the working of the Estate would naturally and properly have been the object of the association. But it is not easy to see what other object they could express, looking at the position in which they stood, by the above quoted words of their resolution to enter into a partnership, than to put the Estate itself in the partnership and make it the real substantial partnership stock or fund. We quite agree with " Duvergier " when he says: (Contrat de Société Nos. 196 et 197) " Lorsqu'une chose est mise en société, il y a " présomption qu'elle est apportée en toute " propriété. Dans ce contrat, comme dans " tous ceux qui sont susceptibles de transfé- " rer la propriété, il est évident que la trans- " mission est entière et complète, à moins de " restriction formelle, de réserve expresse. En " sorte qu'on peut dire que le droit commun, " c'est la mise de la propriété des choses dans " la société, et l'exception, la mise de la " simple jouissance. La volonté de restrein- " dre la mise sociale à la jouissance des objets " qui la composent doit, donc, être claire- " ment manifestée."

It will be observed that in the intervention itself, in the " ouverture de crédit", Besnard declares that the Estate is in partnership between him and Duval for eight years. Again, in the compromise or arrangement with the Bank on the 20th of February 1869, the existence of the partnership is explicitly recognized, for it is said that the recourse by the Bank is paralysed by the existence of the partnership, and in lieu of the informal and ineffectual mortgage over half of the Estate, the Bank for the reduced amount gets an effectual but postponed mortgage over the whole.

2nd. The Estate " Clairfond " having been thus vested as partnership property in Duval and Besnard, we have next to enquire who had the right to grant a valid mortgage over it or any part of it. The newly created third party, the Company or partnership, the " Être moral " as it is often called in French Law, was now the owner of the Estate. Could an individual partner continue to deal with his share in the partnership, or what may more properly be called his eventual personal interest in the Company? This is a question of great importance in this present suit. It may indeed be said to be the key of the whole case, for if the mortgage, alleged to be contained in the intervention by Besnard to the " ouverture de crédit," be null and void, many of the other points argued cease to be of any prominent importance for the decision of the case.

This *personality* of the Company or partnership is derived from the Roman Law where it was expressed in the maxim, " Societas " personœ vice fungitur." " On établit que " la Société soit distincte des associés. ' So- " cietas est corpus mysticum '; qu'elle forme- " rait un être moral, une personne fictive, " ayant son domicile, son patrimoine, ses " droits, ses dettes, ses actions, indépendants " et séparés du domicile, du patrimoine, des " droits, des dettes, des actions des associés " pris individuellement. Que le fonds social " formât, exclusivement, le gage des créan- " ciers; que l'associé considéré comme vendeur " de la chose qu'il apportait, n'avait sur le " patrimoine commun aucun droit actuel, " mais seulement une éventualité, une espé- " rance réalisée à la dissolution de la Société; " que toute action était interdite aux créan- " ciers personnels de l'associé, tant que durait " la Société; leur droit se bornait à se présen- " ter au partage, pour s'emparer du lot attri-

" bué à leur débiteur." Delangle, *Sociétés Commerciales*, Vol. I, page 17.

This learned writer cites the various articles of the Code on which effect is given in our modern law to this principle, page 18. *Ibid:* accordingly, the highly favored hypothec of the wife of an individual partner cannot, during the society, be made to attach to her husband's share of the partnership property. The Company alone can grant rights over the property. This was decided in the case of Brodie v. Bestel and others, already referred to. The same has been decided in France. Cour de Paris, 17 Juillet 1830, Delangle, *supra*.

The grounds of the Judgment are very clearly put by the Court: " attendu que durant l'existence d'une société, la propriété des objets qu'elle possède réside sur la tête de la société, considérée comme corps moral, et que nul des sociétaires n'a de droit individuel ni sur tous, ni sur chacun des objets en particulier; qu'à cet égard, tout, jusqu'à la dissolution de la société, se réduit en leur faveur à un droit eventuel, ou même à une simple expectative. "

This judgment was confirmed on appeal. 10th May 1831. *Ibid.*

That the partnership constitute *a person*, totally different from and independent of the individual associates, is laid down by TROPLONG, referring to the articles of the Code, in terms equally clear. " Société " article 1832 C. C. § 65, &c., &c. Towards the close of his commentary he says §80 " ceci nous conduit à cette vérité palpable, à savoir, que le créancier particulier d'un associé ne pourrait faire saisir les effets de la société sous prétexte que son débiteur y a une part indivise. Il doit patienter jusqu'à la liquidation, et, en attendant, prendre des mesures conservatoires au moyen d'oppositions entre les mains de la société, ou d'arrêts sur les bénéfices à partager annuellement, &c., &c.',

It appears to us that those eminent writers have given a correct exposition of the law.

We, therefore, think that the consent to mortgage given by Besnard was given *a non domino*; consequently that it was altogether invalid and inept.

It has been argued that, assuming that the mortgage was originally ineffectual as being granted by only one of the partners, it was subsequently rendered valid by the recognition and ratification of Duval the other partner. Giving our best attention to all the facts, we are unable to find in the proceedings anything at all approaching to a ratification on the part of Duval. It is therefore unnecessary to consider whether such act originally null and void, as the act of one of two partners, was legally susceptible of ratification by the adhesion of the other partner.

The appellant has submitted that the transaction between Besnard and Duval was not a partition but an act of sale. But what then? Every act between the parties which puts an end to the indivision has the same legal effects as a partition, be it a a sale or any other transaction. DEMOLOMBE, " Successions," Vol. V, p. 278. Hewetson *v.* Barry & others. 26th April 1872, Piston's Reports, page 30, in this Court.

We need not multiply authorities on this point.

But holding, as we do, that the mortgage by Besnard over one half of the Estate was null and void, the ground is cut from under the appellant's feet, and it is unnecessary to pursue this matter farther.

The appellant put forward some arguments to show that the sale by Besnard to Duval was in fraud of his, the appellant's rights. We find no ground for this allegation. The partnership was not secret, it appeared in the books of the Conservator of Mortgages, when the deed of the 1st of June 1863 was transcribed. The dissolution was gone about openly and fairly, it appeared in the Transcription Office. Rougé, as a creditor of Besnard, might have protected his interest by insisting that nothing should be done as to the dissolving the partnership and dividing the property unless in his presence, and he might have attached the price paid by Duval. But he remained silent all the while, till after the lapse of years he raised those questions, under the present *contredit*, in the distribution of the sale price of " Clairfond."

Having thus considered all the questions which appear to us to be material for the decision of the case, we have arrived at the conclusion that the appeal must be dismissed; the Master's judgment of the 26th May 1873 is affirmed and also the Master's judgment of the 1st October last.

As to the costs of this appeal, and any other costs not disposed of by the judgments of the Master which we have just affirmed, we order that Rougé's account of expenses under the first appeal and the of the respondents under this appeal, be given in and taxed, and when these are before us we shall dispose of the question of costs.

SUPREME COURT.

—

MOTION,—DIVISION OF WATER,—REMOVAL, OF A DAM, — LAND COURT, — ORDER OF THE COURT,—FINAL JUDGMENT.

—

CHAUVIN & OTHERS,—Plaintiffs.

versus

MÉRANDON & OTHERS,—Defendants.

—

Before

His Honor Mr. JUSTICE BESTEL, First Puisne Judge and

His Honor Mr. JUSTICE GORRIE, Second Puisne Judge.

—

P. L. CHASTELLIER,—Of Counsel for Plaintiffs.
G. A. RITTER,—Attorney for the same.

G. GUIBERT,—Of Counsel for Defendants.
J. GUIBERT,—Attorney for the same.

—

23rd February 1874.

On the motion and statement of Mr. Guibert for the defendants that the parties had not been able to come to an amicable understanding as to the division of the water in the river below the third mill wheel, the Court order the dam complained of, if not already removed, to be removed within forty eight hours; and the plaintiffs to make application forthwith to the Land Court for a division of the water in the river from the point where the overflow, from the third mill wheel, falls into the bed of the "Belle Eau," and this before final Judgment.

SUPREME COURT.

—

CLAIM OF £12,955.7 2 FOR DUTY PAID ON THE IMPORTATION OF RUM,—CONTRACT OF SUPPLY TO HER MAJESTY'S LAND AND SEA FORCES,— TABLE OF EXEMPTIONS, — CUSTOMS ORDINANCE No. 8 OF 1854.

In this case the Court ruled that where a party seeks to recover any duty on Custom which has been overpaid, even if it shall appear to be judicially established that the sum had been charged under an erroneous construction of the Law, he is debarred of his action, if the amount so paid be not claimed, in virtue of Ordinance No. 8 of 1854, within three years from the date of such payment.

—

GODON & OTHERS,—Plaintiffs

versus

THE COLONIAL GOVERNMENT,—Defendant.

—

Before

His Honor Sir C. FARQUHAR SHAND, Knight, Chief Justice, Judge, and
His Honor Mr. JUSTICE GORRIE, 2nd Puisne Judge.

—

E. PELLEREAU,—Of Counsel for Plaintiffs.
E. EDWARDS,—Attorney for the same.

L. COX, Acting Substitute Procureur & Advocate Gen.,—Of Counsel for Defendant.
J. BOUCHET,—Attorney for the same.

—

26th Febeuary 1874.

THE COURT. (after consultation). In this case the Counsel for the Government, the Acting Substitute Procureur General, has consented that the facts alleged by the plaintiffs, as the foundation of their demand, shall be assumed as true; and on those facts so admitted has contended that the plaintiffs must be put out of Court. After fully hearing the Counsel on both sides, we are of opinion that the action cannot be maintained.

The plaintiffs seek to recover a very large sum of duty (£12,955.7.2) paid by them, without complaint or reclamation during a period of 12 years, viz: from 1st April 1860 to 31st March 1872, on the importation of rum and red wine, part of which was consumed by the troops in Mauritius under a contract of supply, dated 31st March 1862.

By that agreement the plaintiffs undertook to furnish the canteens with wine, beer, &c., to be supplied "at such fair and reasonable "markets rates respectively as shall be fixed "by a board of officers, who shall fix quarter-

" ly the said rates from the publicly declared " prices obtainable from the Chamber of Com- " merce, or the sworn brokers' Rooms, and " shall decide on the quality and also shall " supply the troops with rum at so much the " small and large glass, &c."

The plaintiffs contend that they are entitled, under Ordinance No. 8 of 1854, to reclaim the duty paid by them on their importations. In the table of exceptions from duty, appended to that law, are enumerated; " Provisions " and Stores of every description imported " or supplied for the use of Her Majesty's " Land and Sea forces, or for the Colonial " Government."

Even were we to assume that the terms of this law cover wine and rum, the plaintiffs are, at the outset, met with the difficulty of recovering back money voluntarily paid by them, without objection, for so many years. A *condictio indebiti* is always a difficult suit, for the plaintiff seeks to undo what he himself has done; and although it is sometimes said that the distinction between payments made *errore facti* or *errore juris* is now put an end to by the Code, we are scarcely of that opinion. But waiving difficulties, more or less speculative, we think that under the contract and the facts existing here, no such claim as the present can be maintained. It appears to us that, as the prices of the wine were to be fixed by a board of Officers taking the current prices of the day as their guide, it was contemplated that the import duties on the admission of the wine in the Colony had been paid as in the case of the wines on the prices current of the period. As to the rum, the prices paid at the canteen are admitted to have been extremely liberal, and to add, to that highly remunerative price, a remission of the duties on import, would, in our opinion, be not only without warrant in the contract, but in opposition to the understanding of the parties of their own contract, and in the circumstances quite unjust. It will not escape attention that the money so paid has been *bonâ fide* received and spent by the Government, and to order its repayment now would be to upset the budgets for the last 12 years and to do violence to one of the best established principles of law in question of receiving back money, voluntarily paid and received, and spent in good faith.

But further, the plaintiff's case is not, we think, within the clause in Ordinance 8 of 1854 noticed above.

The rum and wine in question, though ultimately partly supplied to the troops, was imported by the plaintiffs for their general purposes. They held the usual licenses for sales of spirits &c., &c, and kept a store or shop from which the public were supplied. At the end of the contract, which ran for 12 years, it seems to have struck them, as an afterthought, that they might sue the Government for the import duties proportionable to the quantities of wine and rum sold to the troops. We do not think that they are entitled to do so.

At the trial, reference was also made by the plaintiffs to the Ordinance No. 30 of 1865. We are not able to see its bearing on the present dispute.

The duties imposed by Ordinance No. 9 of 1854 are by § 2 to be levied and received under the Regulations contained in Ordinance No. 8 of the same year. Now, by § 66 of that latter Ordinance, any duty on custom which has been overpaid, even if it shall appear to be judicially established that the sum had been charged under an erroneous construction of the Law, shall not be returned after the expiration of three years from the date of such payment. Therefore the case is dismissed with costs against the plaintiff.

SUPREME COURT.

—

JUDGMENT OF ADJUDICATION, — TRANSCRIPTION OF THE SAME, — PAYMENT OF THE PURCHASE PRICE, — INTERVENTION, — RENUNCIATION OF A LEGAL MORTGAGE, — GUARDIAN, — MINORS, — FAMILY COUNCIL, — INSCRIPTION OF MORTGAGES, — DELAY, ORDINANCES 57 of 1860 & 36 of 1863, — ARTICLE 2181 OF THE CIVIL CODE.

Circumstances under which the Court held that the plaintiff, having failed to follow the formalities traced out by Ordinances 57 of 1860 and 36 of 1863, which require that all privileges and mortgages, whether conventional, judicial or legal, should be inscribed within a certain delay, could not now attack the judgment of adjudication which awarded to the Government, for railway purposes, a certain plot of ground in this town of Port Louis.

Action dismissed with costs.

—

MARTIN MONCAMP, — Plaintiff,

versus

THE COLONIAL SECRETARY, — Defendant.

—

Before

His Honor Sir CH. FARQUHAR SHAND, KNT., Chief Judge, and
His Honor Mr. JUSTICE BESTEL, First Puisne Judge.

—

E. GALLET,—Of Counsel for Plaintiff.
F. MALLET,—Attorney for the same.

L. COX,—Actg. Subt. Proc. Gen.,—Of Counsel for Defendant.
J. BOUCHET,—Attorney for the same.

—

4th March 1874.

A judgment of adjudication of the 25th of April 1862 pronounced by Victor Esnouf, District Magistrate of Port Louis, awarded to the Colonial Government for Railway purposes, a portion of ground of the extent of 980 square toises belonging to Hippolyte Le Mière, and Philippe Gaston Martin Moncamp the father, and then guardian of the plaintiff, for the sum of £454.3.6. or $2270.81. That sum was stipulated payable after transcription of the said judgment, and upon a certificate of the Conservator of Mortgages. The judgment of adjudication was transcribed on the 4th of June 1862, and a certificate was delivered by the Conservator of Mortgages establishing the fact that the two Inscriptions, encumbering the above plot of ground, had been erased. This two-fold condition of the judgment of adjudication being realized, might not the Government have been compelled by the owners of the land to pay its purchase price? for greater safety's sake, however, we notice that the intervention of Mrs. Le Mière was required. In the notarial discharge given by her husband, Mrs Le Mière intervened and expressly declared that she renounced her legal mortgage; whilst on his side Martin Moncamp in the same Inscription of the 10th of September 1863, duly registered, declares in presence of H. Le Mière, the then subguardian of plaintiff, that "as far "as the legal mortgage which his other children, still under age, (of which the plaintiff "was one) may have against him, it has "been erased on the "Belle Carrière" Estate "(of which the plot of ground parted with "formed a part) and restricted to another "property "Le Souffleur", in compliance "with the resolutions of the family council "of the said minors of the 28th of June 1862, "duly registered, and homologated by the "Supreme Court on the 18th of July, same "year.

The plaintiff, born on the 1st of February 1844, became of age on the 1st February 1865, but took only on the 22nd of March 1865 (or 22 days after the delay for inscribing had expired) an inscription for the principal sum of $7,790 & 79: and later, on the 3rd of August 1865, then being of age, he ceded priority to the Crédit Foncier of Mauritius on the "Souffleur" and thus deprived himself of the possibility of being paid the amount of his legal mortgage on that Estate. The object of this action is clearly to repair the wrong he has sustained through his own laches.

If we refer to article 12 of Ordinance No. 57 of 1860, expressly enacted to facilitate the transfer of land for public purposes, we find that "all the privileges and mortgages whe-"ther conventional, judicial or legal, are to be "inscribed within fifteen days after the tran-"scription of the deed of sale: failing which "within such delay, the land sold shall be free "from all privileges and mortgages whatsoever, "without prejudice to the rights of wives, "minors and interdicted persons, upon the "amount of the compensation, so long as it "shall not have been paid or as long as the "Ordre" shall not have been finally deter-"mined amongst the persons interested." Unfortunately for the plaintiff, he came in with his alleged claim long after the purchase price had been paid, not to his guardian, but to his father in the latter's own right.

If we refer to the Transcription Ordinance, No. 36 of 1863, we are told in article 10, "In "the event of a minor not having his legal mort-"gage inscribed within the *year* following "the conclusion of his tutory, his mortgage "shall, in regard to third parties, bear date "only from the date of any inscription which "may be taken thereon after the said inter-"val. Article 23 of the same Ordinance 7o "2nd § says "In so far as regards rights to "legal mortgages which shall have opened be-"fore this Ordinance shall have come into ope-"ration, the inscription required by the 10th "Article must be taken within *one year* from "the date when this Ordinance shall come "into operation, and, in default of such in-"scription, the legal mortgages shall take "rank from the date on which they shall be "afterwards inscribed."

These are the several arguments urged by the Substitute Procureur General, against the demand of the plaintiff. But Gallet, on the other side, contended that the "subrogé tuteur" though having been, as such, a member of, and as having concurred in the resolutions of the family council now complained of, was not specially called in at the homologation of the same resolutions: and that consequently final proceedings are not required

to set aside the judgment of homologation of this Court. This is a very startling position, but there is no absolute necessity for us to give a formal decision thereon, as we find that there is much more in the cause adverse to the plaintiff's contention; and it was further contended that article 12 of Ordinance No. 57 of 1860, applied only to voluntary sales, and not to the forced sales, such as the one before the Court, contemplated by article 57 of that Ordinance, which article requires in such cases "that the price or compensation "AGREED to, or fixed in terms of the Ordin- "ance, and consigned as aforesaid, shall be "paid to the party or parties having right to "it after the PROPER STEPS shall have been "taken for CLEARANCE of mortgages."

In the first place, there being no opposition from any quarter to the payment of Gaston Martin Moncamp's share of the purchase price, there was no necessity for the consignment of that price.

2o. The Ordinance is a very special one and complete by itself. It has traced out the formalities to be observed for the clearance of mortgages on land transferred for public purposes. It requires, by article 12, that the deed of sale be transcribed, — conformably to article 2181 of the Civil Code—and that all privileges, mortgages, conventional, judicial or legal, be inscribed within fifteen days after such transcription. Failing inscription within such delay, the land to be free from all privileges and mortgages whatsoever, saving however the rights of minors upon the amount of the compensation, so long as it shall not have been paid, or the "Ordre" not closed.

The words of article 57, in speaking of the proper steps to be taken for clearance of mortgages, must and do necessarily refer, not to the several articles 2183, 2185 and 2186 of the Civil Code, but to the formalities set out in article 12 of the same Ordinance. "*In toto* "*jure, generi per speciem derogatur, et illud* "*potissimum habetur quod ad speciem direc-* "*tum est.*" (L. 80 Digest. *De regulis juris.*)

It is true that the second paragraph of article 57 says that the price, if claimed before the ordinary delay for such clearance, shall be distributed according to the rules of the common law. According to the very text of the law, these rules refer to the *distribution* of the price, and not to the *clearance* which is to be effected as directed by the Ordinance, and not according to the rules of common law as contended for by the plaintiff's counsel.

Action is, accordingly, dismissed with costs.

SUPREME COURT.

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TAXATION OF BILLS OF COSTS,—REFERENCE TO THE MASTER OF THE SUPREME COURT, —REPORT TO BE MADE BY HIM,—NOTARIAL DEEDS, — ENCESSIVE CHARGES FOR THE SAME.

—

ROUGÉ,—Appellant

versus

THE CRÉDIT FONCIER OF MAURITIUS & OTHERS,—Respondents.

(Ordre Clairfond)

Before:

His Honor Sir CH. FARQUHAR SHAND, KT., Chief Judge, and

His Honor Mr. JUSTICE GORRIE, Second Puisne Judge.

—

E. PELLEREAU,—Of Counsel for Appellant.
E. EDWARDS,—Attorney for the same.

G. GUIBERT,
P. L. CHASTELLIER,
H. GALÉA,
E. GALLET,
} Of Counsel for the Respondents.

J. GUIBERT,
A. ROLANDO,
V. DUCRAY,
J. PINÉGUY,
F. VICTOR,
M. SAUZIER,
J. H. ACKROYD,
} Attornies for the same.

—

6*th March* 1874.

In this case we ordered, by our judgment of 11th February last, that Rougé's account of expenses, under the first appeal, and that of the respondents, under the second appeal, be taxed and given in to the Registry, when we would dispose of the question of costs.

A mass of bill of costs have been produced which we refer to the Master to state what have been disposed of by him under the judgment affirmed, and to report the amounts of the costs of the appellant and respondents respectively under the judgment of the Court

of 11th February last—the report to be made orally to the Court on Wednesday next, at eleven o'clock, when parties wishing it will be heard.

We may add that we have observed, in cursorily glancing over the accounts, a charge of £147 sterling for a copy of a notarial deed. We shall expect the Master to be prepared to explain upon what principle he has allowed such a charge in a bill of costs against the losing litigant. There seem also to be bills at the instance of one respondent against the others. This appears to require explanation.

BAIL COURT.

APPEAL FROM A JUDGMENT OF THE DISTRICT MAGISTRATE OF PORT LOUIS,—RENT,—LANDLORD AND TENANT,—NOTICE TO QUIT,—"USAGE DES LIEUX",—ARTICLE 1736 OF THE CIVIL CODE.

The Court, on a former appeal between the same parties, ruled that, whatever be the length of a notice to quit, reciprocity existed between landlord and tenant with respect to the notice to be given; but, in the present case, the Court, after a careful examination of the evidence brought forward by both parties, came to the conclusion that the evidence adduced did not point out clearly that any "usage des lieux" existed in this Island.

WILSON & ANOTHER,—Appellants

versus

MAUREL,—Respondent.

Before

His Honor Mr. Justice BESTEL, 1st Puisne Judge.

L. ROUILLARD,—Of Counsel for Appellant.
F. MALLET,—Attorney for the same.

V. DELAFAYE,—Of Counsel for Respondent.
G. A. RITTER,—Attorney for the same.

18*th March* 1874.

When this case came before me for the first time, I found no sufficient evidence of "usage des lieux" to which I am referred by the Code (art. 1736 C. C.) to decide as to the sufficiency of the "congé" to be given on either side.

After ruling that be the length of the notice, whatever it was, reciprocity, which was denied by the Court below, existed between landlord and tenant; that is to say if a notice of 1, 2 or 3 months were required from the landlord to the tenant, the latter was bound to give a similar notice of one, two or three months to the landlord.

This done I remitted the case to the Court below to enquire more fully into the usage in Port Louis. The further evidence returned upon that remit is just as unsatisfactory as that originally returned.

The only conclusion I have been able to come to, after careful consideration, is that I have no evidence of the existence of any "usage des lieux" in this Island. Some parties have given and accepted one month's notice without any distinction between a private residence or of a warehouse, others have been satisfied with a two month's notice, whilst again others have required a three month's notice.

Hence, it is apparent that neither the plaintiff nor the defendant have proved their respective allegations. I shall and do, therefore, dismiss this appeal without costs.

SUPREME COURT.

WORK AND LABOUR DONE,—VALUATION OF THE SAME BY AN APPRAISER APPOINTED BY THE COURT,—REPORT,—PLAINT OF "QUANTUM MERUIT,"—RULES OF PLEADING,—"ULTRA PETITA,"—COSTS.

Circumstances under which the Court ruled that where a party claims a certain definite sum for work and labour done, he cannot, afterwards, be allowed to recover a larger sum even when, after an appraisement, it had been shown the work was worth much more. The Court, further, decided that it would not grant the plaintiff his costs because he had denied, on oath, the receipt of certain sums of money on account, which had been clearly established by the evidence, adduced on behalf of the defendant, he had received.

PIN,—Plaintiff

versus

DUBOISÉ DE RIQUEBOURG,—Defendant.

—

Before

His Honor Sir C. FARQUHAR SHAND, Knight, Chief Judge and

His Honor Mr. Justice BESTEL, First Puisne Judge.

—

T. L. JENKINS,—Of Counsel for Plaintiff.
P. LASTELLE.—Attorney for the same.

P. L. CHASTELLIER,— Of Counsel for Defendant.
M. SAUZIER,—Attorney for the same.

—

20*th March* 1874.

The parties not having been able to agree as to the real value of the work done for the defendant by the plaintiff, the Court remitted the matter to Mr. Connal, the Surveyor General, for his report.

It results from his inquiry that the total value of the work executed by the plaintiff is, in the reporter's opinion, £334.4.6 This is considerably above what the plaintiff asked in his Plaint, in which he confined his demand to $1,200 or £240. It is true that in his Plaint, he added " or such sum as the " Court shall think fit to award, after hearing " the case and after an appraisement, if the " Court shall think proper to order one."

It does not appear to us that we are warranted, in this case, in giving the plaintiff more than he asks. It is a general rule of pleading that a Court of Justice cannot go "*ultra petita*," i. e. cannot go beyond what is concluded for by the plaintiff, who ought to know best what he has done, and what is due to him for his pains. From the indistinctness of the general evidence as to what work was really executed by the plaintiff for the defendant, and its true value, we were obliged to call in the aid of a professional man, and he puts a somewhat higher estimation on the work than the plaintiff. This satisfies us that the plaintiff's claim is a *bonâ fide* one, that the work was properly executed, and is a valuable addition of the defendant's Estate; but we cannot do violence to the rule of pleading already referred to, and introduce into this case and engraft on the conclusions a sort of claim of *quantum meruit* on behalf of the plaintiff. The plaintiff must know what the work cost him in its execution, and he gets this, plus all that he asks for his labour and trouble.

We shall give judgment in favor of the plaintiff for the amount concluded for, deducting the sums shewn to have been paid to account, that is for the sum of $1,200 minus $885 or $345.

As to costs, in ordinary circumstances where the plaintiff is successful in his demand, he is allowed his costs; but here, unfortunately for the plaintiff, he denied on oath having received any payment or value to account; but such we found were established by evidence, and ought to be put to his debit, and altogether his conduct in this case has been open to serious animadversion. We cannot, therefore, allow him costs generally, but we think it is proper that the defendant should pay the costs of the remit to the Surveyor General.

Judgment, therefore, for plaintiff in the sum of $345, the defendant to pay the costs of the remit to the Surveyor General, no other costs to either party.

BAIL COURT.

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CLAIM OF $ 450,—BALANCE OF AN ACCOUNT,—GOODS SOLD AND DELIVERED,—BOOKS AND ACCOUNTS,—AMENDMENT OF PLAINT,—COSTS OF THE SAME.

—

C. MARTIN & Co.,—Plaintiffs

—

FURCY FLEURIOT,—Defendant.

—

Before

His Honor SIR CHARLES F. SHAND, Knight, Chief Judge.

—

L ROUILLARD,—Of Counsel for Plaintiffs.
E. EDWARDS,—Attorney for the same.
P. L. CHASTELLIER,—Of Counsel for Defendants.
A. COLIN,—Attorney for the same.

—

20th March 1874.

The plaintiffs alleged that the defendant was indebted to their firm in the sum of $450, being the balance remaining due on an account of $555.64 for goods sold and delivered by the plaintiffs to the defendants, from 2nd February 1872 to 17th July 1872.

At the trial, the plaintiffs, Martin & Co., tendered a statement which Martin swore was taken *verbatim* from their books, containing an account of all the dealings between parties commencing on 30th December 1870 and ending on 17th July 1872. This account was certified as correct by Mr. H. Ryder, the liquidator of the plaintiffs' firm. Chastellier objected to its production, as in the plaint the demand was limited, as above mentioned, to the balance of an account for goods sold and delivered from 2nd February 1872 to 17th July of the same year.

THE COURT.

I think it is my duty to amend the plaint to the effect of allowing the question between the parties to be disposed of in this suit; in other words to ascertain what balance, if any, is due to the plaintiffs in the whole dealings with the defendant, but I will make a note as to the costs of amendment. Document admitted.

The balance appearing due to the plaintiffs on said account was $ 438.09, and not $ 450 as sued for. The plaintiff, when called upon in the box, was not prepared to point out how this discrepancy arose, but he at once said that he abandoned the difference. He also admitted that a payment of $ 50 to account on 18th June 1872, for which a receipt signed by himself was tendered by the defendant, did not at all appear in the account. He swore that all the articles had been sold and delivered, and that the balance, as now restricted by him, was still resting owing.

The defendant denied that any part of the account was due; he alleged that he had paid all that was owing, having sent a friend, who appeared as a witness and confirmed this statement, to whom the plaintiff handed an account of all that was due by him from and after the last settlement. That this "solde dû" (29th February 1872) was $81.33 and it was duly paid. That, no doubt, goods had been, subsequently, taken by him from the plaintiffs, but that he produced receipts shewing that they had all been paid by him; consequently he was not indebted in any sum to the plaintiff. He admitted that he kept no business books.

It seems plain that the carelesness and blunders of the plaintiffs have contributed much to the bringing of the present suit. The defendant paid all that was asked of him as due at a certain date, and the confusion has arisen from this payment or part of it having been applied to previous sales and deliveries, which the plaintiff himself seems to have overlooked when he told the defendant what was the amount really due by him, at the time when the defendant asked for his account and paid what was demanded. It is also to be noted that the plaintiff Martin has stated the balance, which he says is due to him, at $450, at $ 443 and at $ 438 and has committed other mistakes and blunders; but it would be too much on that account to make him loose altogether the value of the goods furnished and delivered by him, and of which the defendant has had the benefit. But the plaintiffs can be allowed no costs; on the contrary they will have to pay the costs of amendment of the Plaint, which I fix at £10.

Judgment therefore for plaintiffs in the sum of $388, without interest. The plaintiffs to pay £10 costs to defendant. No other costs.

BAIL COURT.

AGENCY, — COMMISSION, — DELIVERY OF GOODS,—DEED OF PARTNERSHIP,—AMENDMENT OF PLAINT,—ORAL AND DOCUMENTARY EVIDENCE,—COSTS.

NAIRAC,—Plaintiff

versus

MÉDÉRIQUE,—Defendant.

Before

Hir Honor Sir C. FARQUHAR SHAND, Knight, Chief Judge.

P. L. CHASTELLIER,—Of Counsel for Plaintiff.
V. DUCRAY,—Attorney for the same.

W. NEWTON,—Of Counsel for Defendant.
E. EDWARDS,—Attorney for the same.

1st May 1874.

THE COURT.

This is a suit for payment of the cost of procuring and forwarding to the defendant certain articles of household furniture, obtained by the plaintiff from France on the order given to him, as he alleges, of the defendant.

The defendant denies that he gave any such order.

At the time when the plaintiff alleges that the order was received by him the defendant was in partnership with one Syracuse, in Port Louis, for carrying on the business of upholsterers. The plaintiff deponed, on oath, that the order was given to him both by Syracuse and by the defendant. He produces a note in the handwriting of the latter, containing a list of the articles, which he swears the defendant brought to him, as the foundation of the order. It appears that the partnership was dissolved before the articles arrived in Mauritius, and the defendant wished the plaintiff to cancel the order, but his answer was, "it is now too late." The goods arrived, and the defendant, after many conferences on the subject and attempts with the assistance of friends to settle the matter, refused to take the articles and pay the prices and expenses.

The question to be determined is one of fact; has the plaintiff proved that the order was given to him by the defendant, or sanctioned and adopted by the defendant?

After a careful consideration of the whole evidence I am satisfied that the plaintiff has proved his case, but one of the commissions charged in his account must, I think, be struck out. Under that deduction, judgment is now given in terms of the plaint, for the sum of $378,74. As to costs the plaintiff was allowed to amend his plaint before proceeding, under reservation of the question of costs, he will, therefore, be allowed only 2/3 of their amount, as taxed by the Master.

BAIL COURT.

—

APPEAL FROM A CONVICTION OF THE DISTRICT MAGISTRATE OF PLAINES WILHEMS,—INFORMATION,—AMBIGUITY IN THE WORDING OF THE SAME,—RECEIVING STOLEN PROPERTY,—ARTICLE 40 OF THE PENAL CODE,—WITNESSES,—RE-EXAMINATION OF THE SAME,—"AIDING AND ABETTING",—ART. 38 OF THE PENAL CODE.

The Court, in this case, decided that although the words "aiding and abetting" were to be found at the end of the Information, which was one for receiving articles carried off, abstracted or obtained by means of a crime or misdemeanor, (art. 40 of the Penal Code) they were obviously meant to be exegetical or explanatory, and not a formal substantive portion of the charge; 2o. that, in the absence of any sacramental words which must be used under pain of nullity, the words "to the prejudice of" were a sufficient averment of the ownership of the articles alleged to have been abstracted; and thirdly, that when a witness is recalled, there is no absolute necessity that he should be reminded that he is still under oath, however proper it may be to administer this caution.

—

HINGHEN,—Appellant

versus

THE QUEEN,—Respondent.

—

Before

His Honor Sir C. FARQUHAR SHAND, Knight, Chief Judge.

—

W. NEWTON,—Of Counsel for Appellant.
A. PITOT,—Attorney for the same.

L. COX,—Acting Substitute Procureur and Adv. Gen ,—Of Counsel for Respondent.
J. BOUCHET,—Queen's Attorney.

—

1st May 1874.

This was an appeal from a judgment of the District Court of Plaines Wilhems, whereby the appellant was sentenced, under article 40 of the Penal Code, to eight months' imprisonment with hard labor. The original complaint was against two persons and ran as follows: "that, on or about the 18th November 1873, "at Rose Hill, in the district of Plaines Wil- "hems, one Moheeputh, groom on Stanley "Estate, in the said district, did wilfully, "maliciously and fraudulently steal, take and "carry away to the prejudice of Edgard An- "telme, his master, a set of harness consist- "ing of a collar, a saddle and bridle; and "that one Hinghen, a livery-stable keeper "at Rose Hill, in the said district, did un- "lawfully and fraudulently receive from the "said Moheeputh and keep in his possession

" the aforesaid, well knowing the same to " have been stolen, thereby aiding and abet- " ting the said Moheeputh in the commission " of the said larceny, contrary to the Penal " Code."

Both the accused parties were found guilty, and sentenced to eight months' imprisonment with hard labor. Hinghen appealed.

NEWTON, for appellant, urged very strongly that the Information did not set forth precisely and distinctly the exact charge meant to be established against Hinghen. If the charge was to be dealt with as under article 40 of the Penal Code, it was impossible to say whether it was meant to be laid under the first or second part of the article, which runs in these terms:

" Those, who knowingly shall have receiv- " ed, in whole or in part, or who, without " sufficient excuse or justification, shall have " been found to have in their possession. ar- " ticles, carried off, abstracted, or obtained by " means of a crime or misdemeanor, shall be " held and punished as accomplices in such " crime or misdemeanor."

Counsel farther contended that, from the last words of the charge, it seemed to be intended to be an accusation, under article 38 of the same Code, of " aiding and abetting." " Those, who shall have knowingly aided and " abetted the author or authors of any crime " or misdemeanor in the means of preparing, " facilitating, or perpetrating such crime or " misdemeanor shall be deemed accomplices. "

Besides, it was argued, the ownership of the articles alleged to have been abstracted is not sufficiently averred. The words " to the prejudice of". are too weak for this purpose. The name of the owner should be expressly stated, or it should be said that his name is unknown to the prosecution. The former cases of Ramen v. the Queen, Piston 1865, p. 139: The Queen v. Hinghen, Piston, 1866 p. 147; Tiroovengadon v. the Queen, Piston 1872 p. 88, were relied on, as well as Payley on Convictions, page 141, 143, 147: " nothing should be implied in favour of a " conviction and nothing implied against it " *Ibid.*

2o. The principal witness, Edgard Antelme, was recalled in the course of the trial, and he was not re-sworn or even warned that he was still under oath.

3o. The Conviction here is not in the shape and form ordered by the law; see schedule 20 of Ordinance No. 35 of 1852.

COX FOR CROWN, contra. There is no defect in the present Information, all that can be alleged is that there is a certain obscurity. The other objections are mere irregularities which, though to be regretted, cannot set aside the proceedings.

THE COURT. The objections to this Conviction, founded on the words of the sections of the Penal Code relied on and the previous decisions of this Court, have been very anxiously pressed. I have given my best consideration to the argument, and carefully perused the reports of the decisions referred to. I quite concur in the principles laid down in the cases referred to, such as " that the char- " ge ought to specify the exact offence; that " the criminal possession alleged ought to be " stated to be in connection with a specific " crime set forth in the Information; and " that the conviction ought to be in harmo- " ny with the charge." Now, it appears to me that the Information in the present case does specify the exact offence meant to be charged, viz: receiving articles carried off, abstracted or obtained by means of a crime or misdemeanor, in other words that the charge is under article 40 of the Penal Code and the first branch of that article, and not at all, under article 38. It is true that the framer of the Information has, most unnecessarily, added the words about " aiding and abetting" at the end of the charge. But these words are plainly superfluous. They are obviously meant to be exegetical or explanatory, not a formal substantive portion of the charge. Again, although it would have been better to allege directly that the articles were the property of Edgard Antelme, this is done so clearly by implication, that I think the object of the law, in the absence of any sacramental words which must be used under pain of nullity, is sufficiently satisfied.

2o. Where a witness is recalled, especially when a considerable interval has elapsed since his previous examination, he is usually reminded that he is still on oath. But this is not absolutely required, however proper it may be to administer this caution. In the present case the witness appears to have been out of the box for only a short time.

3o. As to third objection, I regret to say that the orders, on more than one occasion given by this Court to the District Magistrates, have not been attended to. See among others, the case of *Bawarash* versus the Queen. Piston's Reports, 1st November 1872.

Should this irregularity be repeated by District Magistrates after this renewed warning, it will be necessary that the Court should notice it in a more disagreable way.

Such an irregularity will not annul the proceedings.

Appeal dismissed with costs.

BAIL COURT.

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APPEAL FROM A JUDGMENT OF THE STIPENDIARY MAGISTRATE OF FLACQ,—MASTER AND SERVANT,—NEGLECT OF WORK,—CANCELLATION OF CONTRACT,—ORDER IN COUNCIL OF 7TH OF SEPTEMBER 1838,—ORDINANCE No. 15 OF 1852.

No appeal can lie against the judgment of a Stipendiary Magistrate when the party, who wishes to make the appeal, is a servant, unless the sum or penalty adjudged to be paid by him is more than the amount of one month's wages, or a sentence of imprisonment exceeding ten days.

—

VEEREN,—Appellant

versus

DE VILLECOURT, —Respondent.

—

Before

His Honor SIR C. FARQUHAR SHAND, KT.
Chief Judge.

—

P. BEAUGEARD,—Of Counsel for Appellant.
E. EDWARDS,—Attorney for the same.

T. L. JENKINS,—Of Counsel for Respondent.
J. H. ACKROYD,—Attorney for the same.

—

1st May 1874.

This was an appeal from the Court of the Stipendiary Magistrate of Flacq. The respondent in the appeal, J. de Villecourt, Planter of "Rivière Sèche," had complained against the appellant Veeren (Passenger), laborer on his Estate, that defendant did neglect to execute the orders given to him by complainant's overseer on 9th February 1874, at about 2 o'clock P. M., and prays for cancellation of defendant's contract of service. The case, after postponment asked for by the defendant, (now appellant) was heard on 11th March last. Both parties were represented by Counsel, and, after hearing various witnesses, the Magistrate sentenced the accused to fifteen days forfeiture of wages (i. e. under his contract to forfeit the sum of one pound) and engagement cancelled.

This judgment was given under § 7 of Chapter IV of the Order in Council of 7th September 1838, which came into force on 31st March 1839. The law runs in these terms: "On complaint preferred, and proof "made, before any Stipendiary Magistrate, "that any servant has neglected to perform "his stipulated work, or that he has performed it negligently or improperly, or that by "negligence or other improper conduct he "has injured the property of his master entrusted to his care, the Magistrate may, in "his discretion, adjudge the servant to any "one or more of the following penalties; that "is to say, a pecuniary penalty for the benefit of the master, not exceeding one "month's wages, or the commitment of the "servant to prison with or without hard labor, for any term not exceeding fourteen "days, or the dissolution of the Contract of "Service."

Veeren appealed, but he was met with the preliminary objection that the case was not legally appealable, and it is upon that question that a decision now falls to be given.

The matter of appeal in this class of questions is regulated by the following section of Ordinance No. 15 of 1852.

"If any person shall think himself aggrieved by any judgment or order of any Stipendiary Magistrate, or of a Court of Petty "Sessions, such person may appeal from any "such order or judgment to the Supreme "Court of this Colony, provided the sum or "penalty adjudged to be paid shall be more "than £2 if awarded against a master, or if "awarded against a servant, more than the "amount of one month's wages, or by a sentence of imprisonment for a time exceeding "10 days; otherwise such judgment, or order "shall be final and finitive to all intents "and purposes."

In the case where the servant wishes to appeal, he can only do so when the sum or penalty adjudged to be paid by him shall be more than the amount of one month's wages, or a sentence of imprisonment exceeding ten days. In the present case the wages of the appellant were £2 per month. He has been fined only £1. In cases of this nature, the rules established for the review of the Magistrates' decisions must be strictly followed. The appeal is not within the law, and it must stand dismissed with costs.

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BAIL COURT.

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APPEAL FROM A CONVICTION OF THE DISTRICT MAGISTRATE OF PORT LOUIS,—INFORMATION,—BEING FOUND IN POSSESSION OF STOLEN PROPERTY,—ART. 40 OF THE PENAL CODE.

Held by the Court that the omission of the date in the Information, on which the proceedings took place in the Court below, could not destroy and annul all that had been done, as the accused had suffered no hardship by this omission, the material facts and dates in the case having been minutely given in the Information itself.

—

SUMSEER,—Appellant

versus

THE QUEEN,—Respondent.

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Before

His Honor Sir C. FARQUHAR SHAND, Knight, Chief Judge.

—

W. NEWTON,—Of Counsel for Appellant
P. N. CHARON,—Attorney for the same.

L. COX, Acting Substitute Procureur & Adv. General } —Of Counsel for Respondent.
J. BOUCHET,—Queen's Attorney.

—

1*st May* 1874.

This was an appeal from a Conviction of the Junior District Magistrate of Port Louis. The accused was charged with having in his possession, unlawfully, a case of tin plate without sufficient excuse or justification, not belonging to him, and which had been stolen on the 8th day of November from the Convent at Pamplemousses.

The only ground of appeal insisted on was that the date of the Information, on which the proceedings took place in the Court below, was not fully set forth. The date actually given was the day of August 1873. Accidentally and certainly very carelessly, the day of the month had not been filled in. It is plain, however, that the accused could suffer no hardship by this omission, for all the material facts and dates in the case were minutely given in the Information itself.

The omission in the Information is a blunder on the part of the officials in the Court below, but it will not destroy and annul the proceedings which, in other respects, are complete. I will take care that this carelessness shall not escape official censure. Appeal is dismissed with costs.

BAIL COURT.

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APPEAL FROM A CONVICTION OF THE DISTRICT MAGISTRATE OF GRAND PORT,—LARCENY,—"PAS GÉOMÉTRIQUES",—LEASE OF THE SAME,—RIGHT OF FISHING.

Held by the Court that, as the "Pas Géométriques" are reckoned from the line of the shore which is reached by high-water mark, that part of the land, which is left dry at low tide, does not form part of the "Pas Géométriques" proper and, in consequence, when no exclusive right of fishing is given to a tenant by Government, when making leases of the said "Pas Géométriques", the public had a perfect right of fishing thereon.

—

LEBRET & OTHERS,—Appellants

versus

THE QUEEN,—Respondent.

—

Before:

His Honor Mr. JUSTICE GORRIE, Second Puisne Judge.

—

P. BEAUGEARD,—Of Counsel for Appellants.
E. EDWARDS,—Attorney for the same.

L. COX, Acting Substitute Procureur & Adv. General. } Of Counsel for Respondent.
J. BOUCHET,—Queen's Attorney.

—

7*th May* 1874.

In this case certain fishermen were charged with stealing oysters on the Estate of "Ferney," and the proof on the part of the complainants by which the offence was sought to be established, and which was deemed satisfactory by the Magistrate, was that the par-

tion of the coast, where the oysters were fished, formed a portion of the "Pas Géométriques" leased by the Crown to the proprietors of "Ferney."

The "Pas Géométriques" are reckoned *from* the line of the shore which is reached by high-water mark, whereas the only dispute, in this instance, was whether the place where the oysters were fished, was left dry at low tides. It could not therefore form part of the "Pas Géométriques" proper. But the lease contains also the addition "together "with the annexes of the said land composed "of the islets and sand-banks uncovered by "the sea at low tide," and the "Arrêté," defining the "Pas Géométriques," describes these annexes as including ponds of sea-water &c., islets adjacent to the shore, and sandy banks which become dry at low tide.

The object of thus defining the "Pas Géométriques" and annexes was for the purpose of securing them as a part of the public domain, and to prevent their occupation and incorporation into private estates; but I see nothing in the lease to warrant the conclusion that the Crown intended to give up to the private proprietors, to whom it leased for a small consideration the "Pas Géométriques" and annexes, the exclusive right of fishing to the deprivation of the rights of the public, and a fatal discouragement to the industry of the dwellers by the sea-coast. Any limitation of this right of the public would require to be very clearly expressed, before a Court of Justice could hold that the Crown had divested itself of it to the benefit of private individuals, and I find nothing whatever in the lease conveying of such a nature; I must quash the judgment appealed against.

SUPREME COURT.

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CLAIM OF £ 400 AS DAMAGES,—TRESPASS ON A PIECE OF GROUND RESERVED AS A BURIAL GROUND, — NOTARIAL DEED, — SALE BY LICITATION,—"CAHIER DES CHARGES,"—CONDITIONS OF SALE, — "RÉSERVE," — RIGHT OF WAY, — APPOINTMENT OF A LAND SURVEYOR BY THE COURT,—COSTS.

In this case the plaintiff sought to recover possession of a piece of land of 17 *acres or thereabouts in extent, which he alleged had been reserved by one of his ancestors, as a burial-ground; but the Court, after taking into consideration all the facts of the case, the title-deeds, the evidence adduced, came to the conclusion that the portion of land, so reserved as a burial-ground, did not extend further than the screen of fruit-trees on the outer edge of the place wherein lie the remains of some members of the plaintiff's family. The Court, in consequence, ordered that that portion of land should be set apart by a Sworn Land Surveyor, and that a road should be made giving access to the burial-ground, in terms of the defendant's obligation.*

—

DUVAL & ANOTHER,—Plaintiffs

versus

RONDINEAU & OTHERS,—Defendants.

—

Before

His Honor Sir C. FARQUHAR SHAND, KT., Chief Judge and

His Honor Mr. JUSTICE BESTEL, First Puisne Judge.

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W. NEWTON, — Of Counsel for Plaintiffs.
E. EDWARDS,—Attorney for the same.

E. PELLEREAU,—Of Counsel for Defendants.
E. DUVIVIER,—Attorney for the same.

—

8th May 1874.

This was an action, by which the plaintiffs, Jean Pierre Marie Aimé Duval, and Jean Eugène Artidor Célicourt Duval, both in their own personal name and in the name of all the other heirs and representatives of the late Jean Baptiste Duval, sought to recover the sum of four hundred pounds sterling, as damages for the loss and prejudice, trouble and annoyance, suffered by them on account of the defendants who, as owners of the 156 acres of land hereinafter referred to, had trespassed on the reserved plot of burial-ground, had planted canes thereon and had caused stones to be cut out of a quarry within ten yards of the spot on which the tombs of several of the Duval family are erected,—and also for many other facts fully set forth in the plaintiffs' declaration.

The defendants, on the other hand, prayed that the action be dismissed with costs, and pleaded among other pleas those of a ten and of a thirty years prescription, whereupon issue was joined and the case came on before us for judgment.

Witnesses were heard both on behalf of the plaintiffs and defendants, and the Court took time to consider.

The history of this case is as follows:

On the 2nd of January 1786, Jean Baptiste Duval, the head of the Duval family, at Grand Port, obtained from the French Government a grant of one hundred and sixty six acres of land at Cent Gaulettes in the same district, to count for one hundred and fifty six acres only, for the various reasons mentioned in the "procès-verbal" of the measurement of the land by Bataille, the then Government Land Surveyor. On the 2nd of June 1818 the original grantee, Jean Baptiste Duval, in a paper (found after his death) alleged to have been written by him, had expressed his will that "Ce morceau de terrain, "lieu dit son tombeau, ne sera pas compris "après sa mort dans aucun partage ni vente, "et restera à son fils Jean Antoine Eugène "Duval, et après lui, à son fils Jean Quantin "Duval et ensuite à ses petits enfants, tou-"jours les plus âgés, qui ne pourront jamais "le louer ni vendre, mais bien le considérer "comme *lieu sacré*, où reposeront les mânes "de leurs père et mère, à la charge par eux "de l'entretien et réparation du tombeau élé-"vé sur le *dit morceau* de terrain qui est "borné par M. Dalais, Gabriel Duval, et la "Rivière des Créoles." On the 19th of December 1821, a licitation takes place of the above land at the request of the original grantee, Jean Baptiste Duval, who had expressed his will as above, in reference to the "morceau de terrain" he was anxious should be reserved for a burial-ground, both for his family and for himself. The licitation was sued for by the said Jean Baptiste Duval, after the death of his wife Jeanne Josephe Roussel.

Description of the land licitated.

1o. "Un terrain habitation de 156 arpents "situé aux Cent Gaulettes, quartier du Grand "Port, *la face* par le sieur Dalais, *l'autre "côté*, par les sieurs Gabriel Duval et Clé-"ment, et la *profondeur* par des montagnes, "traversée *dans toute sa largeur par la Ri-"vière des Créoles.*"

"A un bout de l'habitation existe *une pe-"tite case en charpente*, entourée d'un mur "en maçonne, servant de tombeau au corps "de feu *la dite* dame Duval, et de plusieurs "de ses enfants."

"Il y existe aussi quelques arbres fruitiers, "des palmistes, et des allées et vergers de "jameroses."

Article 3 of the conditions of sale of the said land runs thus:

"L'adjudicataire prendra la *totalité* du bien, "les 156 *arpents* ci-dessus désignés en l'état "que le tout se trouvera et comportera le jour "de l'adjudication, sans pouvoir demander "aucune diminution du prix ni indemnité "pour défaut de mesure, contenance ou au-"trement, ni exiger aucune réparation; et il "*ne pourra aliéner* ni *détruire l'enclos* qui "sert de tombeau au corps de feu la dite "dame Duval et plusieurs de ses enfants."

After the death of the said Jean Baptiste Duval, the above 156 acres of land were licitated at the request of Jean Antoine Eugène Duval, one of the heirs of the said Jean Baptiste Duval.

In the "Cahier des Charges" of this second licitation, under date of the 18*th of February* 1829, we read:

"Premier lot. Un terrain habitation de la "contenance d'environ 156 arpents." In the description of the lot No. 1, we find: "A une "extrémité de la dite habitation, sont les "tombeaux des sieur et dame Duval et de "plusieurs de leurs enfants. Le *lieu* où ils "sont situés est entouré de quelques arbres "fruitiers. Il y existe une petite case en "charpente, entourée d'un mur en maçonne.

"*Ce lieu* ne sera pas compris dans la vente, "ainsi qu'il sera dit, ci-après, à l'article 3 "des conditions"

Article 3 referred to runs as follows:

"*La portion* de terre *sur laquelle* les sieur "et dame Duval et plusieurs de leurs enfants "*ont été inhumés*, et *ont leurs tombeaux*, n'est "point comprise dans la présente vente; elle "sera inaliénable à perpétuité et demeurera "toujours à la famille Duval, ainsi qu'il est "exprimé dans un écrit du sieur Jean Baptis-"te Duval père, en date du 2 Juin 1818, "inventorié après son décès. 1ère pièce, cote "1. L'adjudicataire et tous ceux qui lui suc-"céderont ne pourront jamais y avoir aucun "droit, la famille Duval demeurant autorisée "à faire en tous temps ce qui sera nécessaire "pour la conservation, l'entretien et même "l'embellissement des monuments et *du lieu "où ils sont élevés, lequel* se trouve à *l'extré-"mité* de l'habitation *située* aux Cent Gau-"lettes, et *est borné sur deux côtés par les ba-"lisages du sieur Dalais, du troisième côté "par le sieur Gabriel Duval, et du quatrième "côté par la Rivière des Créoles.*

"Ce lieu est entouré par quelques *arbres "fruiers*, et il y existe *une petite case en "charpente*, entourée d'un *mur en maçonne.*

"1er lot acquis par Eugène Duval et An-"dré Legentil."

In the "Cahier des Charges" of the licitation of the *5th of February* 1861, at the request of Nelzir Duval, as heir for a part of the late Jean Antoine Eugène Duval and Anne Eliza Legentil, his late father and mother, *versus* Evelinor Duval, André Legentil and wife &c, the property to be sold is described to be the plot of ground of 156 *acres* at "Cent Gaulettes," and is said to be bounded, *the face* by Dalais' property, on one side by the said Dalais and Michel Duval's properties, and the depth by mountains, crossed in all its width by the "Rivière des Créoles." No buildings or plantations whatsoever exist thereon.

Under the head of "title-deed" we read: "The said plot of ground belonged to the succession of the late Jean Antoine Eugène Duval and to André Legentil, according to a judgment of adjudication of the late Court of First Instance of this Colony, dated the 19th day of February 1839, duly registered, made upon a licitation which was sued of the said property between the heirs of the late Jean Baptiste Duval and his deceased wife."

In article 7 of the conditions of sale it is stipulated: "The *portion of land*, whereupon the late Jean Antoine Eugène Duval and wife and several of their children were buried and have their tombs, and *which is situate* at *the extremity* of the *property* now *sold*, is not comprised in the present sale. The *purchaser shall give a road* through the property now sold, in order to arrive at the *said tombs*, and the said portion of land, *reserved* by the present conditions of sale, IS THE ONE comprised *within the fruit trees planted around the said tombs*." The Estate was awarded, on the 5th of *February* 1861, to Célicourt Duval, Nelzir Duval and Evelinor Duval.

4th May 1863. "Vente notariée par Jean Eugène Artidor Célicourt Duval et Chiffone Clément, his wife, et Jean Pierre Eugène Evelinor Duval, à Jean Henri Eugène Nelzir Duval." It is therein stated: "Il est fait observer qu'aux termes du procès-verbal de l'adjudication sus-énoncée (5 Février 1861), il a été *fait réserve d'une portion de terrain* où se trouvent *inhumés* M. et Mme Jean Antoine Eugène Duval, ainsi que plusieurs de leurs enfants et *sur laquelle sont élevées leurs tombes* Cette portion de terrain se trouve à l'extrémité de la propriété, dont les 7/12 sont présentement vendus et *est entourée d'arbres fruitiers* Il a été stipulé, en outre, que *l'acquéreur donnerait un chemin sur la dite propriété* pour arriver aux dites tombes. En conséquence, cette *portion* de terrain *ainsi décrite* n'est pas *comprise* dans la présente vente."

27th September 1866 The next sale of the *27th September* 1866 is one by forcible ejectment, at the request of Loïs Raoul against Jean Henri Eugène Nelzir Duval. Article 1 of the conditions of sale of the said property of 166 acres or thereabouts, stipulated that "the purchaser or purchasers shall take the said landed property with all charges and servitudes of whatsoever nature, either active or passive." It was purchased on the 27th day of September 1866 by Mrs. Marie Françoise Rochery, the wife of Donald de Rochecouste.

1*st of June* 1871. Sale by Mrs de Rochecouste, purchaser under the forcible ejectment above referred to, to her son Jérome Louis de Rochecouste of the land so purchased by her.

It is therein stated that: "Tel que le tout se poursuit et comporte *sans* exception, ni *réserve autre* que celui d'une *petite portion* de terre, servant de sépulture à la famille Duval, *avec droit à un chemin* pour y communiquer: laquelle *portion* de terre se trouve *à l'extrémité* du terrain de 166 arpents et est entourée d'arbres fruitiers."

1*st of March* 1872. Sale by Jérome Louis de Rochecouste to A. Rondineau of the 166 acres of land above referred to. "Réserve: Enfin *une petite portion* de terre *servant de sépulture* à la famille Duval *avec droit à un chemin* pour y communiquer, *laquelle portion* de terre se trouve à l'extrémité du terrain de 166 arpents, et est entourée d'arbres fruitiers.

"Il est fait observer que cette dernière réserve à été faite à l'égard de Monsieur Louis de Rochecouste, aux termes du contrat du 1er Juin 1871 ci-après énoncé," that is in the sale from Mrs. de Rochecouste to her son Louis Jérôme de Rochecouste, the present vendor.

23*rd January* 1873. Sale by Rondineau to Charles Drouard of one undivided half of the said land. No further reserve was made in this deed than those set forth in the deed of sale from Louis de Rochecouste to A. Rondineau.

JUDGMENT.

The extracts from the various instruments set out, as above, shew that the extent of the land which the original grantee and head of the Duval family, Jean Baptiste Duval, originally intended to reserve for the purpose of a burial-ground, is not so large as contended for by the plaintiffs.

The so-called declaration of Jean Baptiste Duval speaks, in the first place, of the "*mor-*

ceau de terrain" (morsel of ground) designated by him as "his tomb," which he wishes should never be divided amongst his heirs nor sold upon any account, but should be considered "comme lieu sacré où reposeront les "mânes de leurs père et mère, à la charge "par eux (ses enfants ou petits enfants) de "l'entretien et réparation du tombeau élevé "sur le morceau de terrain qui est borné par "MM. Dalais, Gabriel Duval et la Rivière "des Créoles."

True it is, that certain boundaries are here given, but the "morceau de terrain" being within and forming part and parcel of the larger portion now contended for, it is evident that the abuttals given will and do apply to the small portion occupied by the tombs of the dead members of the Duval family, as well as to the larger portion.

Again, on the licitation sued for by Jean Baptiste Duval after the death of his wife, we find the vendor Jean Baptiste Duval saying under the head of the description of the land licitated, "à un bout de l'habitation ex-"iste une petite case entourée d'un mur en "maçonne, servant de tombeau au corps de "feu la dite dame Duval et de plusieurs de "ses enfants. Il y existe aussi quelques ar-"bres fruitiers, des palmistes, et des allées et "vergers de jameroses."

In condition 3 of the "Cahier des Charges," it is stipulated by the vendor Jean Baptiste Duval: "L'adjudicataire prendra la *totalité* du bien ci-dessus," that is "les 156 "arpents. Il ne pourra aliéner ni détruire "l'enclos qui sert de tombeau au corps de la "feue dame Duval et de plusieurs de ses en-"fants."

If Jean Baptiste Duval ever intended to reserve the large piece of land now claimed as a burial-ground for the Duval family as contended for, he would surely never have put up for sale the whole of the land conceded to him, viz: the 156 acres; and he would not have made it imperative on the purchaser not to alienate or destroy merely the "enclos" (or enclosure) wherein rest the remains of his wife and of several of their children, but he would have mentioned the whole of the land upon which the enclosure was practised, and not that part of it only which was enclosed.

18*th February* 1829 *Licitation after decease of Jean Baptiste Duval.* Again, in the description of lot No. 1 of 156 acres, we read "à une extrémité de la dite habitation sont "les tombeaux des sieur et dame Duval et "de plusieurs de leurs enfants. Le *lieu* où "ils sont situés est entouré de quelques ar-"bres fruitiers. Il y existe une petite case en "charpente, entourée d'un mur en maçonne. "Ce lieu (that is the place where the parties above mentioned have been buried) "nest pas "compris dans la vente."

In condition 3 of the "Cahier des Charges, "la portion de terre sur laquelle les sieur et "dame Duval et plusieurs de leurs enfants "ont été inhumés et ont leurs tombeaux, n'est "point comprise dans la présente vente, lequel "lieu, ou laquelle portion se trouve à l'extré-"mité de l'habitation. Ce lieu est entouré "par quelques arbres fruitiers et il y existe "une petite case en charpente, entourée d'un mur en maçonne." Is it not evident that the reservation made here is the same as that stipulated by Jean Baptiste Duval on the first licitation?

Licitation of 4th February 1851. In article 7 of the conditions of the "Cahier des Charges" on this licitation, the portion of land reserved is the one "whereupon the late Jean "Duval and wife and several of their child-"ren were buried and have their tombs, and "which is situated at the extremity of the "property now sold." If the large plot of ground had been reserved, there would have been no necessity for the stipulation in condition 7 that "the purchaser shall give a road "through the property now sold in order to "arrive at the said tombs, and for further "description of the *locus in quo* and the said "portion of land reserved by the present con-"ditions of sale *is the one comprised within* "*the fruit trees around the tombs.*"

What is the reserve made by the notarial sale of 4th May 1863 to Nelzir Duval by his co-heirs?

"Il est fait observer qu'aux termes du pro-"cès-verbal de l'adjudication sus-énoncée (5th "February 1851), il a été fait réserve d'une "portion de terre où se trouvent inhumés "Monsieur et Madame Duval (Jean Baptis-"te), ainsi que plusieurs de leurs enfants et "sur laquelle sont élevés leurs tombeaux. "Cette portion de terrain se trouve à l'extré-"mité de la propriété, dont les 7/12 sont pré-"sentement vendus, *et est entourée.* Il a été "stipulé, en outre, que l'acquéreur donnerait "un chemin pour arriver aux dites tombes. "En conséquence, cette portion de terrain "*ainsi décrite* n'est pas comprise dans la "présente vente."

27*th September* 1866. The sale by forcible ejectment mentions no special reserves, but the notarial sale by Mrs. de Rochecouste in speaking of lot 1 of the 156 acres, stipulated that the purchaser Louis de Rochecouste shall take that lot amongst others "tel que le tout "se poursuit et comporte sans exception, ni

" réserve, autre que celui d'une petite portion " de terre servant de sépulture à la famille " Duval, avec droit à un chemin pour y com- " muniquer; laquelle portion de terre se trou- " ve à l'extrémité du terrain de 156 arpents " et est entourée d'arbres fruitiers."

1*st March* 1872. The sale from Louis de Rochecouste to Rondineau sets out the following reserve, viz: " Enfin, une petite portion " de terre servant de sépulture à la famille " Duval, avec droit à un chemin pour y com- " muniquer, laquelle portion de terre se trou- " ve à l'extrémité du terrain de 166 arpents, " et est entourée d'arbres fruitiers."

23*rd January* 1873. The sale of an undivided half of that land by Rondineau to Drouard makes no mention of any other reserve.

To sum up. 1o. " Un morceau de terrain " for the purpose of a burial-ground for ever so large a family, cannot, by any possibility, be construed to mean such a large extent of land as is now claimed, 17 acres or thereabouts:

2o. A reserve is made as to the *lieu* or place where certain members of the family were buried.

3o. The piece of land reserved is said to be the one on which a small house is built, surrounded by a stone wall with a screen of fruit-trees &c., &c, on the outer edges.

4o To reach which place, the present proprietor is bound to supply the Duval family with a right of way.

Upon the analysis of the instruments produced in this cause, for the reasons above given, we are of opinion that the reserve does not extend further than the screen of fruit-trees &c., on the outer edge of the place wherein lie the remains of some members of the Duval family.

We, accordingly, order that that portion be set apart by a Sworn Land Surveyor to be appointed by the parties interested, and, in default thereof, by Maillard, Sworn Land Surveyor to be appointed by the Court for that purpose.

The surveyor will have also to set out a road giving access to the burial-ground in terms of the defendant's obligation.

The damages claimed cannot go beyond the value of the stones taken from within the range of the fruit-trees, surrounding the burial-ground.

This value we assess at the sum of £5

Having given judgment on the above grounds, it is not necessary that we should decide the other grounds of defence put forth.

Costs in the meanwhile reserved.

SUPREME COURT.

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DEMAND IN PAYMENT OF A SUM OF $1800 FOR WAGES, — PERSONAL ANSWERS, — " COMMENCEMENT DE PREUVES," — PAROLE EVIDENCE, — OBJECTIONS TO THE SAME,—PLEA OF PRESCRIPTION.

Held by the Court that a claim for wages, payable either monthly or yearly, is barred by the prescription of five years, in terms of Article 2277 of the Civil Code.

—

CASSAGNE, —Plaintiff

versus

BOUFFÉ & OTHERS,—Defendants.

—

Before

His Honor Sir C. FARQUHAR SHAND, Knight, Chief Justice, Judge, and

His Honor Mr. Justice BESTEL, 1st Puisne Judge

—

E. PELLEREAU,—Of Counsel for Plaintiff.
E LAURENT,—Attorney for the same.

P. L. CHASTELLIER,—Of Counsel for Alfred Colin and Eugène Dupòn.sel.
A. J. COLIN,—Attorney for the same.

L. ROUILLARD,—Of Counsel for F. Bouffé.
E. EDWARDS,—Attorney for the same.

—

8th May 1874.

This was an action in payment of a sum of $1800 by defendants as successors by purchase of Messrs. Cassagne and Paillotte, of the Estate " Mon Songe."

The title put in by plaintiff, in support of his claim, is signed by F. Bouffé, one of the

defendants, both for himself and for Alfred Colin and Eugène Duponsel, joint purchasers with him Bouffé of the said Estate from the said Messrs. Cassagne and Paillotte.

On the day of trial the defendants Colin and Duponsel were put on their personal answers. They both denied having any knowledge of any sums being due to the plaintiff for salary, and of their being in any wise indebted to him in any sum whatever. Duponsel went still further, and tendered a receipt of Cassagne "pour solde de tous comptes", of a sum of $ 350 in discharge of his wages up to 1st December 1865, when he retired from the management of the Estate "Mon Songe."

The two defendants Colin and Duponsel, in like manner, positively denied having given any authority whatever, and at any time, to the defendant F. Bouffé, to approve the undertaking then shewn to them for the first time—the contents of which were unknown to them, up to the moment the writing was put into their hands in Court. They further both of them denied any knowledge of the hand-writing of the body of the obligation, though acknowledging the signatures affixed to the document to be in the hand-writing of F. Bouffé.

After the personal interrogatory of Colin & Duponsel, Pellereau on the ground of certain facts having been established in the interrogatory of Colin and Duponsel rendering probable the fact alleged by the plaintiff, proposed to put F. Bouffé into the box as a witness to prove the existence of the claim set up by the plaintiff.

This parole evidence was objected to by Chastellier, 1st. because the sum claimed was beyond 300 francs or £ 12; 2nd. because there was no "commencement de preuves" in the answers of Colin and Duponsel, rendering probable the existence of the claim now set up, after the lapse of so many years, and, especially, in the presence of the receipt tendered by Duponsel establishing the fact of the plaintiff having received from de Barrau and Duponsel "pour solde de tous comptes" the sum of $ 350; 3rd. because the proof demanded was utterly useless, the claim (if any) having been barred by the prescription of 5 years (Art. 2277 C. C.)

In answer to this 2nd argument against the demand before the Court, Pellereau said that it applied to interest of sums due to the "fruits civils" or interest of any sum advanced, but not to sums arising from labor or work done.

It appears to us in whichever light wages for the work done by a manager of an Estate be viewed, we have merely to enquire whether such sums are payable monthly or yearly.

If so, the prescription of Art. 2277 will apply.

Now the wages or salary of the manager of an Estate are payable either monthly or yearly.

If so, the plaintiff is barred from asserting his claim, in the terms of the article above cited, which wills that "généralement tout "ce qui est payable par année, ou à des ter- "mes périodiques plus courts, se prescrive "par cinq ans."

This limitation set up and allowed by the Court, renders it needless that we should say anything as to the allowance of the parole evidence tendered by plaintiff, inasmuch as he is barred from the further prosecution of this, his present action.

This action is, accordingly, dismissed with costs.

SUPREME COURT

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CONTRACT,—INTERPRETATION OF THE SAME, —"COMMUNE INTENTION DES PARTIES CONTRACTANTES," — ART. 1156 OF THE CIVIL CODE,—EVIDENCE.

As in the interpretation of contracts the whole facts and circumstances of the case must be closely looked into, in order to ascertain, in terms of Article 1156 of the Civil Code, "la commune intention des parties contractantes," not in any abstract sense but "secundum subjectum materiam," the Court decided that the evidence adduced, sufficiently established the fact that the defendants had done what was incumbent upon them, in virtue of their deed of agreement, and, accordingly, dismissed the action with costs.

—

BONNEFIN,—Plaintiff

versus

WIDOW & HEIRS ARNAUD,—Defendants.

—

Before

His Honor Sir C. F. SHAND, Knight, Chief Judge, and

His Honor Mr. Justice BESTEL, First Puisne Judge.

—

L. ROUILLARD,—Of Counsel for Plaintiff.
A. DE COMMARMOND,—Attorney for the same.
P. L. CHASTELLIER,—Of Counsel for Defendants.
J. PINÉGUY,—Attorney for the same.

—

15*th May* 1874.

In this case the plaintiff concluded against the defendants that "they should be ordered "to give to a certain road in the district of "Plaines Wilhems, at the place called "Vacoas." commonly styled the "Chemin Anglais" or "Chemin Hunter", twenty feet "width, and repair and macadamize properly "the said road, within a delay to be fixed by "the Court; and, in default of non-execution "of the said judgment, a certain alleged "agreement of 30th December 1862 should "be cancelled and annulled with costs of "suit."

By the agreement referred to, which was entered into on the one part by Messrs. Paillotte and Blanchette, the then proprietors of the Estate "Alexandrine," and, on the other, by Mr. John Hunter, at that time proprietor of the Estate "L'Elisa," it was stipulated as follows:

"M. Hunter possède au quartier des Plai"nes Wilhems, lieu dit le "Vacoas." une "propriété connue sous le nom de "L'Elisa", "et n'ayant pas un chemin pour s'y rendre, "a demandé aux dits sieurs Paillotte et "Blanchette la faculté de faire un chemin à "travers leur propriété "Alexandrine," qui "est limithrope à la sienne; cette demande "lui a été accordée par les dits sieurs Pail"lotte et Blanchette aux conditions suivan"tes:"

"1o. que ce chemin sera ouvert sur la pro"priété "Alexandrine" dans la partie qui "avoisine "La Mare aux Vacoas;"

"2o. que les bois qui seront coupés seront "la propriété des sieurs Paillotte et Blanchet"te, sauf ceux nécessaires au besoin du dit "chemin;"

"3o. qu'il aura une largeur de vingt pieds "dans toute sa longueur, à partir de la route "royale jusqu'au balisage de la propriété du "dit sieur Hunter et qu'il sera fait convena"blement et macadamisé;"

"4o. que tous les frais généralement que "nécessiteront l'ouverture et la fabrication "de ce chemin, seront à la charge personnelle "du dit sieur Hunter et qu'il sera seul char"gé de son entretien;"

"5o. et qu'il sera la propriété des dits "sieurs Paillotte, Blanchette et Hunter ou "de tous ceux qui seront à leurs droit pour "les dites propriétés "Alexandrine" et "L'E"lisa," et de toutes autres acquisitions qu'ils "feront par la suite."

The plaintiff is now in the rights of Messrs. Paillotte & Blanchette, as proprietor of "Alexandrine" (now "Good End"). The defendants are in the rights of Mr. Hunter. They admit their liability to keep the road in sufficient repair, but they traverse all the averments of the plaintiff alleging that they, the defendants, have failed to do so.

The plaintiff and his witnesses stated that the road was in a bad state of repair, and at some places nearly impassable; that on certain parts of it horses in a carriage could only go at a walking pace for safety; that certain persons wishing to purchase plots of ground from the plaintiff were deterred from doing so, by the state of the road in question; that the road was not of the stipulated width and not macadamized.

It was admitted that the defendants some time ago had paid, for the repair of a bridge on the road, a sum of about $150.

On the other side the evidence was overwhelming that the road was made in 1862, at the sight of Paillotte himself, of the covenanted breadth and macadamized with broken stones collected on the spot, and that the road when finished was duly accepted by Paillotte. Paillotte himself and the person who superintended the working of the road, on behalf of Mr. Hunter, deponed to all this on oath. Farther Messrs. Ferdinand Antelme, Alphonse Geffroy, Léopold Antelme, and other witnesses deponed that the road is still of the same breadth, that carriages of every kind pass and repass upon it, particularly during the shooting season, that there is quite enough of space for carriages passing each other in the line of way, and that the road is kept by the defendants or their tenants in the "hangar" on the Estate "L'Elisa" in a state of fair repair as a country road. That the witnesses often pass upon it in carriages of every description, without fear or damage, that in some places the road is rough and it

is prudent to walk the horses, but that this usually occurs in country roads over the whole island.

THE COURT.

In this, as in all other instances, where we are called upon to interpret contracts, we must look at the whole facts and circumstances of the case so as to enable us to ascertain, in terms of Civil Code, Art. 1156: "la commune intention des parties contractantes." We must judge of the common intention of parties here, not in any abstract sense, but *secundum subjectum materiæ*, looking at the position of things and parties. The road to be constructed under the agreement of 1862, in length somewhat more than a mile from the public highway, was intended to give access to a solitary "hangar" or shooting box in a forest in one of the highest lying districts of the island, and to afford facilities for bringing down the wood to the high road. It was to be 30 feet in breadth and macadamized. It has been proved that it was so made at the outset, accepted by Paillotte the plaintiff's predecessor, and still remains of that breadth.

It is further established, by the evidence, that it is kept in repair with wood for the bridges and stones from the neighbouring ground by the defendants, as a fair country road. We do not think that anything beyond this was ever in the contemplation of the parties who made the deed of 1862, and in whose shoes the parties to this suit now are.

We are, accordingly, of opinion that the defendants have done what was incumbent upon them and that the case of the plaintiff must fail. The defendants will remember that, without being reminded by the plaintiff or any other party, it is their duty to see that the road is kept up, as it ought to be according to this judgment.

The case is dismissed with costs against the plaintiff.

SUPREME COURT.

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DEMAND TO SET ASIDE THE SEIZURE OF AN ESTATE, — CONSENT GIVEN FOR SEIZING THE SAME, — OBTAINING CONSENT BY FALSE PRETENCES, — BALANCE OF ACCOUNT, — RECTIFICATION OF THE SAME, — "OUVERTURE DE CRÉDIT," — AGENT, — "COMMISSIONNAIRE," — SEQUESTRATOR, — BILLS, — SALE OF SUGARS.

In this case it was sought to have a consent, given by two partners to their "Commissionnaire," who was their creditor to a large amount, for the seizure and sequestration of their Estate, set aside as null and void, as having been obtained by false pretences; and, secondly, to have it declared that the accounts, furnished by defendant, were erroneous. But the Court decided that those accounts represented the exact figure of the liabilities of the plaintiff and his partner, and that no satisfactory evidence had been adduced to shew that defendant had exercised any fraud or pressure to make them sign the consent for the seizure of the Estate.

Action dismissed with costs, the Master to proceed with the sale of the said Estate.

—

DE CORIOLIS, — Plaintiff

versus

E. THEVENEAU & ANOTHER, — Defendants.

—

Before

His Honor Mr. JUSTICE BESTEL, First Puisne Judge, and

His Honor Mr. Justice GORRIE, Second Puisne Judge.

—

W. NEWTON, — Of Counsel for Plaintiff.
J. H. ACKROYD, — Attorney for the same.

L. ROUILLARD, — Of Counsel for Fayd'herbe.
J. PINÉGUY, — Attorney for the same.

P. L. CHASTELLIER, — Of Counsel for E. Theveneau.
A. COLIN, — Attorney for the same.

—

18*th May* 1874.

The plaintiff's declaration concludes with the prayer that the Court here, do declare and adjudge 1o. that the true balance of the accounts between the said plaintiff and Fayd'herbe, as owners of "L'Uunion" Estate, and the said defendant Theveneau, value of the 30th of December 1873, is of $10,753.15 against plaintiff and Fayd'herbe; 2o. that the true balance of the accounts between the parties aforesaid, on the 9th day of February 1874, and the time of the notice previous to the seizure of the said Estate "L'Union" by the said defendant Theveneau, was at least $8,377.21 in favor of plaintiff and Fayd'herbe; 3o. that the defendant Theveneau had,

therefore, no right to seize the above Estate; 4o. that the consent given to the defendant by the plaintiff and Fayd'herbe to the seizure of their Estate, be declared null and void having been obtained on *fraudulent* pretences, the plaintiff being ready, however, to respect all sums fairly advanced by the sequestrator of the said Estate; 5o. that the case be referred to the Master in order to fix the amount of damages and 6o. that Theveneau be condemned to pay all costs of suit, and that the judgment be common to and binding on Fayd'herbe, the co-defendant as far as need be

The defendant Fayd'herbe joins in the conclusions of de Coriolis, and adds for annulling his consent to the seizure of "L'Union" Estate that Theveneau had exercised upon him and partner undue influence, by alleging himself to be their creditor for a large sum in order thereby to induce them to give such consent to the seizure of the above Estate,—and by holding forth the advantages to arise therefrom.

The whole of the declaration and conclusion above set forth were denied by Theveneau, whereupon issue was joined and the case came on for trial on the 11th May instant.

Parties were examined, as well as the witnesses tendered on both sides.

After hearing the arguments of Counsel the Court adjourned its judgment —to the delivery of which it now proceeds.

JUDGMENT.

The balance due by the plaintiff and his partner to Theveneau, far from being disputed, had been acknowledged by them to be, on the 24th day of December 1873, $ 20,277 87 from the year 1872 to 1873.

Upon the additional credit opened to them on the 24th of December, up to the time when the dealings between parties ceased, the said plaintiff and his partner had received the further sum of $ 13,988.55. Their debt was at that date, therefore, $ 34,276.42. And although the time for payment had not yet arrived, yet plaintiff and his partner having given notice to the defendant Theveneau in the month of January last, that they had stopped their crop, and that they would allow the remainder of the canes on the ground to remain and continue so until the crop of 1874—75, Theveneau who, upon the additional credit, opened on the 12th of December, had advanced the large sum of money, namely $ 13,988.55, naturally enough declined making any further advances. He might have called upon the plaintiff and his partner for the immediate payment of his balance of $34,276.42, and in default thereof might have taken judment against them and proceeded to the seizure and sale of their joint Estate.

Instead of this, Theveneau, having laid before them his books in support of the balance stated in his account with them, suggested to them the expediency of a sequestration of the Estate pending which, ample time would be afforded them to provide themselves with another "commissionnaire," who might carry them on until the following Crop.

In order to have the sequestration of the Estate, a seizure was indispensable. The law's delays would retard matters,— Theveneau, therefore, asked the owners of the Estate at once to consent the immediate seizure and sequestration of their Estate, and the better to convince them of his "bonâ fide" advice, he undertook to become the sequestrator, to supply their Estate with all the requisites for keeping it up, pending the sequestration up to the day of sale; which he did But on the day fixed for the sale the owners moved for a stay of proceedings upon the strength of the allegations, upon the truth of which we are ask a to give judgment.

What truth is there in the allegations of fraud, fraudulent measures and pressure on the part of Theveneau?

It is urged that Theveneau had swollen the balance of his account by carrying into it certain outstanding bills, as paid by and due to him, before their having come to maturity, for the purpose of frightening his debtors into the consent he was so anxious to obtain for the twofold end of seizing their Estate, and carrying it on pending the sequestration.

But what advantages has Theveneau derived therefrom?

He has incurred a great outlay for the keeping up of the Estate to the day fixed for the sale; the funds so laid out by him, he will not be able to recover but on the sale of the Estate—when is the sale to take place? it is a matter of uncertainty: and in the meanwhile his money is locked up, and the interest to be paid him upon his outlay will be perhaps but a poor compensation for the loss of the use of his money for a shorter or longer period of time.

As an intelligent mercantile man, we may rest assured, that the danger had not escaped Theveneau's attention, and the only way of accounting for his having acted as he has done, must have been either anxiety on his part to step in to the aid of the plaintiff and his

associate, in whose good faith he then placed entire reliance; or because he fully believed and relied on the efficiency of the measure suggested.

So far, there is not the slightest reason for suspecting the good faith of Thevenéau,—or a desire on his part either to press or defraud the plaintiff and his associate.

Again, in giving a general account of the transactions between himself and the co-owners of "L'Union Estate", he was necessarily to account to them for the bills, entrusted to him for the better management of their affairs? This he was to do by bringing to their notice, through his general and bill accounts, what he had done with the sugars received, with the amount of their bills, whether before and after maturity. This he has done. All the bills are therein shewn to have been negotiated by Thevenéau with his "aval" thereon, and the produce thereof carried to the credit and debit of de Coriolis and the co-owner. Such of them as have been withdrawn before maturity appear in the account, and rebate has been allowed upon them One bill, not withdrawn, is in the hands of the Commercial Bank, which would hear of no renewal, and for which Thevenéau is still personally liable to the Bank; and two other bills are still in the hands of Thevenéau, who has expressed his readiness to return them to the plaintiff and his associate in final settlement. True it is, that 3 or 4 bills have been negotiated with the Oriental Bank without Thevenéau's aval, whence it was inferred and argued that there was no truth in Thevenéau's statement, that the credit of the owners of "L'Union" Estate was gone, and the necessity therefore for the immediate seizure and sequestration of their Estate, as urged by Thevenau. But what was the answer of Thevenéau to that inference and argument? It was this, that the bills referred to, had been taken by him in person to the Oriental Bank and that the accountant, on Thevenéau's account and credit, had consented to discount the bills, without Thevenau's "aval."

For the truth of this statement he appealed to Mr. Ferguson, the acting Manager of the Oriental Bank, whose evidence the plaintiff and associate did not move the Court to be allowed to adduce for the purpose of rebutting Thevenéau's assertion, which, until disproved, we must hold to be true. Hence the inference that plaintiff's and associate's having no credit on the "Place," Thevenéau being unwilling to incur heavier liabilities as he was not to expect any more sugars, unwilling also to increase his balance against the "L'Union" Estate.

Something was to be done, some means to be devised and resorted to without loss of time for extricating, though momentarily, the owners of that Estate from their painful position The sequestration was urged upon them by their lawful creditor who, in order the better to shew his willingness to aid them, to the utmost, undertook a large outlay of monies for keeping up their Estate, so that if, and when sold, it might fetch a higher price than it would have fetched, if unattended to.

Surely, instead of finding fault with Thévenéau, of blaming him for the hot haste with which he was charged to have acted in this matter, for the pressure he has been said to have exercised on his debtors; the latter ought to be grateful for the assistance he has hitherto afforded them, and saved them from a greater loss, by the immediate seizure and sequestration of their Estate, by his having undertaken, as sequestrator, to keep up the Estate so as to obtain a price which might enable them to satisfy if not all, at least the greater part of their creditors.

For the reasons above-mentioned, we must and do, accordingly, dismiss the action with costs, the Master to proceed with the sale.

BAIL COURT.

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APPEAL FROM A JUDGMENT OF THE DISTRICT MAGISTRATE OF PLAINES WILHENS,—CONTRACT OF LEASE,—"SOUS SEING PRIVÉ," ART 1325 OF THE CIVIL CODE,—"COMMENCEMENT DE PREUVE PAR ÉCRIT,"—PAROLE EVIDENCE,—VERBAL LEASE,—NOTICE TO QUIT,—ART 1736 OF THE CIVIL CODE.

Held by the Court that a "sous seing privé," purporting to be a lease and signed by all the interested parties, but not made in as many copies as there were contracting parties, in virtue of Article 1325 of the Civil Code, was null and could only be considered as a "commencement de preuve par écrit."

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SUZOR,—Appellant

versus

DIOLLE, —Respondent.

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Before

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His Honor Sir C. Farquhar Shand, Kt., Chief Judge.

—

Ls. Rouillard,—Of Counsel for Appellant.
A. Pitot,—Attorney for the same.

W. Newton,—Of Counsel for Respondent.
V. Ducray,—Attorney for the same.

—

3rd June 1874.

This was an appeal from a Judgment of the District Magistrate of Plaines Wilhems. Diolle, the now respondent, had presented an application in the Court below against Suzor, the present appellant, calling on him to quit possession of a plot of ground and appurtenances at "Vacoas" which had been let to him for one year, as Diolle alleged; the lease having come to an end on 11th September preceding. Suzor produced a writing, "sous seing privé," signed by both parties, purporting to be a lease of the subjects with a right of renewal, but no definite period of renewal was mentioned, and a right of ultimate purchase, at a certain price. To the production of this document, Diolle objected that it had not been made in as many copies as there were contracting parties, and was, therefore, null under Article 1325 of the Civil Code. To this it was answered that the writing had been carried into effect and executed, and that, at all events, it was sufficient as a "commencement de preuve par écrit" to form the basis of parole evidence. The Magistrate ruled that the document, as a lease, was null, whereupon the Counsel for Diolle maintained that, in that position of matters, there was only a verbal lease remaining, and invoked the aid of Article 1736 of the Code, whereby it is declared that in such cases notice to quit could only be given according to the custom of the District. The Court below did not, however, sustain this plea; but, holding that there was a "commencement de preuve par écrit," allowed parole proof to be adduced. It was then shown in evidence that, originally, a notarial deed of lease was contemplated by the parties, but it never went beyond a draft and was never executed, and in its place the "sous seing privé" referred to was adopted. This paper was written by Suzor, and signed by both parties, before witnesses. But it turned out that Diolle cannot read and can hardly write, beyond signing his name; though Suzor stated the contrary, Diolle and one witness Clémentine denied, on oath, that all the contents of the paper were read over to him, and he alleged that threats were used to make him subscribe. Again Clémentine's evidence was vague, and he admitted that his memory is bad and he shewed that his recollection of the terms of the deed was defective. He also admitted that Suzor helped him in reading the paper, and that when he could not make out a word, Suzor "gave" it to him. The evidence of another witness, Céradin, was not satisfactory. He stated that he was in the employment of Suzor, that he understood a little of what was read, not much. Other witnesses spoke to Diolle's remarkable ignorance of business.

The District Magistrate found that Suzor had not shewn good cause against the plaint of Diolle, and ordered the notice to quit to issue: against this judgement the present appeal was brought.

THE COURT.

I am satisfied, after looking into the authorities, that the Magistrate's judgment was right, when he held that the document, in the circumstances here, did afford a commencement de preuve par écrit," and allowed oral evidence. I am also satisfied that the document in question in the position of parties and facts in the present case, already recited, cannot he held to be binding upon the parties, as the final evidence of their mutual and intelligent will and consent. The persons engaged in this affair, owing to the want of education and perhaps deficient intelligence of Diolle, were not at all in anything like equal terms; and although it might be thought to be a sort of premium upon ignorance to lay down any general rule that a Court of Law will interfere to set aside alleged agreements, when one of the parties is illiterate, and swears he was not made fully aware of their contents, it is well that persons, dealing with uneducated individuals, should see that there is good and independent legal evidence of the real assent of the latter to alleged conventions and contracts. Looking at all the facts, which I need not repeat, I am not at all satisfied that Diolle really intended to do what he is made to appear to assent to, in the private writing in question. The judgment of the Court below, is therefore, affirmed, and the appeal is dismissed with costs, under a reservation to Suzor of his right to make good any claims for wood, workmanship &c., &c., which he may suppose he has, in law, against Diolle.

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SUPREME COURT

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ACTION IN DIVORCE, — ADULTERY, — MARRIAGES CONTRACTED IN INDIA,—RELIGIOUS CEREMONIES.

In this suit a most important question was raised as to whether a circumstance, which would not be the ground for a divorce in India, where the marriage had been solemnized, could be considered as such in this Colony; but the Court, not being in presence of sufficient evidence, with respect to the point at issue, decided that the case should be heard on its merits, reserving judgment on a matter of such importance, until the question shall have been more fully discussed.

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MOHUN THE WIFE,—Plaintiff

versus

MOHUN THE HUSBAND,—Defendant.

—

Before

His Honor SIR C. FARQUHAR SHAND, Knight, Chief Judge, and

His Honor Mr. JUSTICE BESTEL, First Puisne Judge.

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W. NEWTON,—Of Counsel for Plaintiff.
G. NEWTON,—Attorney for the same.

EUG. BAZIRE,—Of Counsel for Defendant.
J. U. HITIÉ,—Attorney for the same.

—

12*th June* 1874.

This is an action of divorce "*a vinculo matrimonii*" brought by a wife against the husband. The parties are both Indians, they are not christians, they are married according to the rites of their religion (Mussulman) in India, they came to Mauritius in 1858 and it is said that they have resided and been domiciled in Mauritius ever since. It seems that the plaintiff in 1870 returned to India on a visit and remained there about a year, when she came back to Mauritius. The husband is now charged with having taken and lived with a concubine while the wife was absent. The wife has now raised the present suit to have the marriage dissolved, by reason of the husband's adultery.

No evidence has been adduced as yet beyond the marriage certificate; we are asked, on the one hand, to reject the case altogether on the relevancy as one not to be governed by our matrimonial law; on the other, to deal with it as we have done with other cases, where marriage had been solemnized in possessions in India, and the adultery alleged had been committed in Mauritius. At the present stage of the case, we must decline giving any judgment on a matter so important to many of Her Majesty's subjects. When we have the case fully before us in evidence, we shall be prepared to give our best consideration and decide it on its merits.

Meanwhile we order that the case be put on the cause list to be proceeded with in ordinary form.

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SUPREME COURT.

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"SERMENT DÉCISOIRE",—MOTION TO HAVE THE SAME DEFERRED TO A DEFENDANT,—ARTICLES 1358 AND 1360 OF THE CIVIL CODE,—PRESCRIPTION OF FIVE YEARS,—ARTICLES 2275 AND 2277 OF THE CIVIL CODE.

Held by the Court that the "serment décisoire" cannot be deferred to a defendant, after judgment has gone in his favour upon the plea of the five years prescription. It can only be tendered for prescriptions of six months and one year.

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CASSAGNE,—Plaintiff

versus

BOUFFÉ & OTHERS,—Defendants.

—

Before

His Honor Sir C. FARQUHAR SHAND, KT., Chief Judge and

His Honor Mr. JUSTICE BESTEL, First Puisne Judge.

—

E. PELLEREAU,—Of Counsel for Plaintiff.
E. LAURENT,—Attorney for the same.

P. L. CHASTELLIER,—Of Counsel for Defendants.
A. J. COLIN,—Attorney for the same.

—

12th June 1874.

This is the sequel of the case decided on 8th May. *suprà* p. 43.

PELLEREAU *for the plaintiff*, just as the reading of the judgment reported above was closing, claimed for his client the benefit of the "serment décisoire." This was opposed by Chastellier for the defendants, who denied his right, in the circumstances, to put the defendants on their oath, maintaining (first) that it was now too late (2nd) that in a case of this nature, the "serment décisoire" was not competent or admissible. He referred to the Civil Code, Art. 1360: Note by *Sirey*, Art. 1358, No. 12; *Sirey's* notes, Arts. 2275, 2277. *Pellereau, contra*, relying on C. C. Arts. 1358 and 1360.

THE COURT.

On the first point we are with the plaintiff. We think he was not too late in deferring the matter to the oath of his opponents, seeing his Counsel made the motion just as the reading of the judgment against his client was being concluded, and Article 1360 of the Code allows the reference "en tout état de cause." On the second point we have more difficulty. It is true that by article 1358 of the Code it is declared that "le serment décisoire peut "être déféré sur quelque espèce de contesta- "tion que ce soit," but in this case we have had pleaded, and pleaded successfully, the peremptory defence of Prescription, viz: the quinquennial prescription of Article 2277 of the Civil Code. Now, there is no authority in the Code for allowing the oath of defendants in this class of cases. As to the shorter prescriptions, the oath is specially allowed by Article 2275, but with respect to the 5 years prescription, there is no repetition of such allowance; looking at the whole framing of this part of the Code, we are driven to the conclusion that the oath of a defendant was not intended to be admitted, after judgment had gone in his favour upon the plea of the 5 years prescription. Indeed the five years prescription, by the highest authorities in France, is dealt with as a matter of public order for the protection of the public. Notes by *Sirey, in loco*. This affords an additional reason why the five years prescription, once established, should not be exposed to the chance of being set aside or defeated by the oath of a defendant. Motion to take the oath refused.

BAIL COURT.

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CONSIGNMENT OF GOODS,—BILLS OF LADING,—BILLS OF EXCHANGE,—PAYMENT OF THE SAME BY A THIRD PARTY,—CONTRACT,—INTEREST,—SALE OF GOODS,—COMMISSION,—NET PROCEEDS,—DIVISION OF THE SAME,—EVIDENCE,—ORDINANCE No. 9 OF 1871.

A question was raised, in this case, as to whether the husband, who was summoned as a witness on behalf of his wife, could be heard; the Court ruled that the evidence was to be rejected as he was not a party to the suit, or individually named in the record, but was called merely for the authorization of his wife. In the case of De Bissy and others, 6th February 1874, *it was held however, by the Court, that in an ordinary civil suit an "ascendant," a mother, was admissible as a witness, when called by her children who are parties to the suit; but this was done, because the mother was a party to the suit on her own account, and individually named in the record.*

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VIGOUREUX & ANOTHER,—Plaintiffs

versus

OMAR JACOB & Co.,—Defendants.

—

Before

His Honor Sir C. FARQUHAR SHAND, Knight, Chief Judge.

—

L. COX, Acting Substitute Procureur & Adv. General } —Of Counsel for Plaintiffs.
J. GUIBERT,—Attorney for the same.

P. L. CHASTELLIER,—Of Counsel for Defendants.
G. A. RITTER,—Attorney for the same.

—

12th June 1874.

In this case the plaintiffs set forth that they had advanced a sum of $5,411.10 to the defendants, to enable them to pay the freight of a cargo of rice and other grain consigned to them just arrived from India, on condition that they should receive nine per cent for their money and a share of 2/5ths of

the net profit they might make on the transaction when the cargo was sold and the price realized. The defendants denied the alleged agreement.

The allegations of the plaintiffs were of this nature. They stated that Mrs. Vigoureux acted in her own name, being separated as to property from her husband, who appeared in the case to authorize her actings; that the ship "Carrick" from Calcutta anchored in the harbour of Port Louis, Mauritius, on the 3rd January last, having on board a cargo of one thousand bags of wheat and five hundred bags of gram, shipped by J. Michael and Co. in and upon the said vessel.

That two bills of exchange, amounting to the sum of $5,411 10, had been drawn by the said J. Michael and Co., on the 16th and 17th December of last year, on defendants, consignees of the aforesaid goods, but upon previous payment thereof.

That the bills of exchange, the bills of lading and other documents connected with the aforesaid shipment of goods had been, by the said J. Michael and Co, endorsed in blank, and by them forwarded, according to the usage of trade, to the Oriental Bank Corporation, Mauritius, with the necessary instructions to part with the said bills of lading, upon previous payment of the aforesaid bills of exchange.

That the defendants, having no money to pay the aforesaid bills of exchange, offered to Vigoureux the wife, thro' her husband and accredited agent, on Monday the 26th January in the present year, to become a partner with them in the following particular kind of transaction, viz: that she would contribute all the money, that is to say the sum of $5,411. 10, being the amount required for the payment of the aforesaid bills of exchange, and that the gain accruing upon the sale of the aforesaid goods, after refunding to the said Vigoureux the wife, on the proceeds of the sale of the aforesaid goods, the sum of $54 1. 10 and interest thereof at the rate of nine *per centum per annum*, would be distributed between the said Vigoureux the wife and the defendants in the following proportion, to wit: two fifths for the said Vigoureux the wife, and three fifths for the defendants, who promised to contribute all the labor necessary for the purpose of selling the said goods as merchants.

And the plaintiffs accepted the said offer, delivered to the said defendants a cheque drawn by her said husband as her agent, on the Mauritius Commercial Bank for the said sum of five thousand four hundred and eleven dollars and 10c., and being to the order of the Oriental Bank Corporation.

That the said cheque having been duly paid, the defendants obtained from the Oriental Bank Corporation the necessary documents for landing the aforesaid goods, took possession of the same, and effected the sale of the said goods for prices which, as alleged by the plaintiffs, after paying all costs and charges, left as their share a net sum to the plaintiffs of $370.80.

The defendants maintained two defences, 1o. that no such agreement was ever entered into, that the advance by the plaintiff, Mrs. Vigoureux, was an ordinary loan, to be repaid with interest at the usual commercial rate of 12 per cent; 2o. that, even if there had been such an agreement, as pretended, the profits would be reduced by the amount of commission to be paid to the defendants for their trouble in realizing the cargo, and of this the plaintiffs, in their calculation, had taken no account.

Oral evidence was adduced by both sides. Among the witnesses tendered for the plaintiff Mrs. Vigoureux, was her husband, objected to by the defendants. He is not admissible under Ordinance No. 9 of 1871.

CHIEF JUDGE. We have had occasion to consider the clauses of this Ordinance lately, more than once. The husband of a party to a suit is expressly excluded by § 1 (last paragraph) of the Ordinance, except in Bankruptcy cases and in cases of personal violence in Criminal Courts We have held, however, in the case of *De Bissy & others*, 6th February 1874, that, in an ordinary civil suit, "an ascendant," a mother, under the same article was admissible when called by her children who are parties to the suit, but then this was done, looking at the terms particularly of § 2, the mother herself, Mrs. de Bissy, being "a party to the suit, on her own account, and individually named in the record." Here there is no such peculiarity, the husband is called merely for the authorization of his wife, keeping in view the express terms of the act; with its policy I have nothing to do, I think the husband must be rejected.

JUDGMENT.

The plaintiffs here undertake to show that they entered into this somewhat peculiar joint adventure or "société en participation" with the defendants. There was nothing illegal in such a convention, but, of course, the burden of establishing its existence lies on the plaintiffs, as the defendants entirely traverse the plaintiffs' allegations. A witness who had

been, at one time, a sworn broker, but had ceased to be a sworn broker before this affair, stated that he was present when the parties arranged the matter, and that a share of the profits was offered by the defendant Omar Jacob to Mrs. Vigoureux: that before this occasion, transactions to the knowledge of the witness had taken place between the parties in connection with advances to the defendant by Mrs. Vigoureux on dock warrants, when 12 per cent interest on the advances was all that was stipulated for, as she, the party making the advances to the defendants, had good real security or a pledge for her money.

The defendant Omar Jacob, on oath, denied that he was to pay more than 12 per cent for the advances in the present case. He had not paid more on former occasions, when he dealt with the plaintiffs, and when the security was not better than it was here: and he deponed, further, that even if he had stipulated to give them a share of the profits, these profits were much less than they averred.

The apparent strength of the plaintiffs' case, here, was the contract which they endeavoured to establish between the previous dealings of parties and the present. Mrs. Vigoureux alleged that, on former occasions, when she merely got commercial interest for the advances she made to the defendant, Omar Jacob, she had absolute security, by way of pledge, of articles belonging to him, under dock warrants, for the payment of the money she advanced. But when we look more narrowly into the facts of this case, it will be seen that, contrary to her averment, that she had no security; in point of fact, the bills of lading were endorsed to her husband on the 26th January last, when the plaintiffs made the advance, thereby giving them the complete command of the cargo. It may be that, of their own free will, the plaintiffs handed back the documents to the defendants and allowed them to deal with the grain, to dispose of it by sale and realize the price; that was their own affair, but for their advance they, undoubtedly, held good security. The evidence is, no doubt, contradictory; but, considering the case in its whole respects, I do not see any probability or reason why the defendants should have acted differently from what they did in former cases, when they promised to repay and did repay the plaintiffs their advances, with 12 per cent interest.

Judgment will, therefore, issue to the effect that on the defendants repaying the advances made to them with 12 per cent interest, this case will stand dismissed, with costs.

BAIL COURT.

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DEMAND IN PAYMENT OF A SUM OF $470.43, —REPAIRS DONE TO A HOUSE,—AGENT,—ACCEPTED ACCOUNT,—"MANDATAIRE,"—INSOLVENCY,—PLEA OF "NOVATION,"—ARTICLES 1271, 1273 AND 1275 OF THE CIVIL CODE.

In order that a plea of "Novation" can be maintained, the Court decided that it must be clearly established that the intention of the creditor was entirely to discharge his original debtor, for as "Novation" is never to be presumed, it can never be entertained except upon positive proof of its existence.

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DUCHENNE,—Plaintiff

versus

GNELLO & OTHERS,—Defendants.

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Before

His Honor Sir C. FARQUHAR SHAND, Knight, Chief Judge.

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W. NEWTON,—Of Counsel for Plaintiff.
V. DUCRAY,—Attorney for the same.

Hon. E. J. LECLÉZIO,—Of Counsel for Defendants.
J. GUIBERT,—Attorney for the same.

—

12th June 1874.

On 20th August 1873 the plaintiff agreed with Mr. J. Canonville, merchant in Port Louis, to execute certain repairs, for the sum of $520.61, upon a house situate in Port Louis, described in the "devis" as "la propriété de Mr. , située rue des Créoles." The price ultimately agreed upon was fixed at the sum of $470.43, and the work was duly executed by the plaintiff. Mr. Canonville was the authorized agent of the defendants in Mauritius, to whom the house belonged. Instead of paying the amount when demanded by the plaintiff, in October last, Mr Canonville accepted his account "J. Canonville & Co." payable on the 31st January following. The plaintiff took the account, so accepted, and cashed it at the Oriental Bank; but the affairs of Canonville & Co. having become embarrassed, the account was not paid at maturity, and the plaintiff had to refund the amount which the Bank had advanced to him on his accepted account.

The present suit was then raised against the owners of the house, for payment of the account for repairs. They took their stand on a plea of "novation," maintaining that the plaintiff, when he got his account accepted by Canonville & Co, had in law given a discharge to the defendants, and had accepted that firm as his debtors in their lieu and stead.

From the evidence adduced, it appeared that Mr. J. Canonville personnally was the attorney appointed by the defendants who live in France; that, when he put the acceptance on the plaintiff's account in October last, he had in his hands funds of the defendants more than sufficient to meet it; that, in his account with the defendants, his constituents, he carried the amount to their special debit—that, on 11th December when he called the creditors of Canonville & Co. together, when unable to meet their engagements, the plaintiff attended but nothing was done: that that firm is now in liquidation and entertain hopes of being able to pay its creditors. It was also shewn that the plaintiff is an illiterate person, who can read, but with difficulty, and as to writing can do no more than sign his name. On oath he repudiated all intention of discharging the defendants by taking the acceptance at the bottom of his account from Canonville in the name of "James Canonville & Co."

It has also been shewn by the evidence that, in the earlier stages of the case, the plaintiff dealt with Mr. Canonville as the agent for and representing the absent owners of the house, which he undertook to repair, as already stated, for a certain price. It is now pleaded by the defendants that when the plaintiff came to Canonville to be paid for his work, he agreed to adopt him or rather the firm of "J. Canonville & Co." as the real debtor and to let his claim fall as against the defendants; in other words, the defence here, and the sole defence, is one of "novation," a well known mode of extinguishing obligations in our law. It need not be said that in whatever way a case like the present is decided, there must be a hardship to one or other of the parties. This, necessarily, arises from the insolvency of an agent, but we have here simply to deal with the only defence put forward in opposition to the demand, viz: a defence of Innovation, *i. e.* an alleged liberation of the original debtor, and adoption by the creditor of a new debtor, in his lieu and stead.

Now, "novation" is never to be presumed. It acts so deep, and makes, as it were, so complete a revolution in the position of parties, that it can never be entertained except upon positive proof of its existence. "La novation ne "se présume point: il faut que la volonté de "l'opérer résulte clairement de l'acte." C. C. 1273. Again the special kind of "novation", here pleaded, is that enumerated as 2nd in article 1271 of the Code. "Lorsqu'un nouveau "débiteur est substitué à l'ancien, *qui est dé-* "*chargé par le créancier.*" Farther, by article 1275, it is enacted "La délégation par "laquelle un débiteur donne au créancier un "autre débiteur qui s'oblige envers le créan-"cier, n'opère point de novation, *si le créan-* "*cier n'a pas expressément déclaré qu'il en-* "*tendait décharger son débiteur qui a fait* "*la délégation.*" Looking at all the facts now before the Court, as disclosed by the written and oral evidence, it does not appear to me that the plea of "novation" has been established by the defendants. It must be remembered that the plaintiff came in contact with Mr. Canonville alone, and that the latter held a double capacity; I am not satisfied that the plaintiff, in his dealings with Mr. Canonville, meant and intended to discharge the original debtors, and he has not expressly said that he did so mean and intend. The requisites for "novation" do not, therefore, exist here, and judgment will be entered for the plaintiff, with costs.

SUPREME COURT.

ACTION IN DIVORCE,—ADULTERY,—"FIN DE NON-RECEVOIR",—MOTION TO HEAR WITNESSES ON BEHALF OF DEFENDANT AFTER EXAMINATION OF THE PLAINTIFF'S WITNESSES,—OBJECTIONS TO THE SAME,—INTERVENTION OF THE MINISTÈRE PUBLIC,—STAY OF PROCEEDINGS,—EVIDENCE ADDUCED BY THE CROWN,—ORDINANCE No. 14 OF 1872,—ARTICLE 306 OF THE CIVIL CODE.

The plaintiff, in this case, asked the Court to grant a decree of divorce in his favour, on account of the adultery of the wife; it was urged, on behalf of the defendant, that there were no grounds for such an action, he, the said plaintiff having been guilty of a similar offence. The Ministère Public gave his conclusions favorable to this plea in bar, and the Court, in presence of the evidence adduced by the Crown, which clearly proved the plaintiff to have committed repeated acts of adultery, held that he had, by his own offence, in virtue of article 27 of Ordinance No. 14 of 1872, estopped himself from claiming the privilege of the law.

Action dismissed with costs.

V*** THE HUSBAND,—Plaintiff

versus

V*** THE WIFE,—Defendant.

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Before

His Honor Mr. Justice BESTEL, First Puisne Judge and

His Honor Mr. JUSTICE GORRIE, 2nd Puisne Judge.

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P. L. CHASTELLIER,—Of Counsel for Plaintiff.
J. G. TESSIER,—Attorney for the same.

W. NEWTON,—Of Counsel for Defendant.
E. LAURENT,—Attorney for the same.

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16*th June* 1874.

This was an action for a divorce "a vinculo matrimonii" by the plaintiff against the defendant, his wife, on the ground of adultery on the part of the latter pending marriage. Up to the day of trial the defendant remained silent.

After the examination of the plaintiff's witnesses by Chastellier, Newton, on behalf of the defendant, moved to be allowed to prove, as a "fin de non-recevoir", the repeated acts of adultery alleged to have been committed by the husband pending marriage, of which acts Mrs. Vieau had had no notice, but at a late hour, and after the time for putting in the list of her witnesses, and raising the "fin non-recevoir" had gone by.

This motion was resisted by Chastellier, because of the late hour at which it was made. The conclusions of the Ministère Public were, however, in favour of the defendant, and he stated that in case the Court should sustain Chastellier's objection, he, the Substitute Procureur General, would then move in virtue of Article 27 of the Ordinance (No. 14 of 1872) for a stay of proceedings, in order that evidence be produced by the Crown, to shew that the plaintiff had, by his own offence, estopped himself from claiming the privilege of the law.

The Court, in the circumstances, considered it unnecessary to give a judgment on the contestation raised by the parties, as the right of the Ministère Public to intervene was not doubted, and they therefore allowed the intervention of the Ministère Public and adjourned the case to thursday the 30th of April now last past, to allow the plaintiff time to rebut the charge made against him. On the day mentioned the Crown proceeded, with the examination of the witnesses, to establish the several acts of adultery alleged to have been committed by the plaintiff.

After hearing the evidence tendered by the Crown to prove the acts of adultery alleged to have been committed by the husband during marriage, Newton moved for the dismissal of the plaintiff's action.

He rested his application on the authority of several judgments of the French Courts and Commentators. Chastellier, on the other hand, contended that assuming, for argument's sake, the plaintiff to have been guilty of the several acts of adultery charged, it did not necessarily follow that he had thereby estopped himself from claiming the privilege of the law; because there is no text of the law, (*Demolombe: Mariage, Vol. II p.* 513 *No.* 415) whether under the Civil Code or of the new Ordinance No. 14 of 1872, which allows the misconduct of a plaintiff man or wife, to be set up as a bar or "fin de non-recevoir." (*Zachariæ: Droit Civil Français, Vol. IV p.* 164 § 492.)

The conclusions of the Ministère Public were for the dismissal of the action on the strength, 1o. of the French authorities cited by Newton (*Duranton: Vol. II p.* 518, *No.* 547) 2o. of the text (Article 27), 3dly of the new divorce Ordinance, No. 14 of 1872; and 4thly, of section 31 of the Divorce and Matrimonial Causes, Act 20—21, Victoria; C. 85.

JUDGMENT.

The point raised by the defendant, is one which had never been taken whether under the enactments of the Civil Code or under the new Ordinance, and is one fully deserving of the consideration of the Court, not only because of its novelty but because of its importance.

On reference to the comments of the French text-writers on this head, and to the jurisprudence of the French Courts (see *Gilbert*: notes on Art. 306 *C. C.* wherein the authorities *pro & con* are fully stated) there is, no doubt, a great variance in the several opinions expressed on the subject matter under consideration.

The leaning of the French authorities upon the whole, some for one reason, others for another, appears to be in favour of the doctrine of *Compensation*, to use the words of the French writers, or *Recrimination* used by English writers.

But allowing that leaning to be against the opinion expressed by the Substitute Procureur General and Newton, we must not forget the great changes introduced into the original law of Divorce, as it stood up to the innovations introduced by the late Ordinance.

Under the new Ordinance we have two provisions, the one to be found in Article 15, and the other in Article 27. Article 15 says that; "on the day appointed for the hearing "of the case the defendant shall be at liber- "ty to allege *any* objection in law intended "to *delay, avoid* or *estop*, or *bar* the suit." This enactment clearly refers to cases where the defendant is aware of any ground of estoppal before the hearing. But the Ordinance is silent, as to an estoppal coming to the knowledge of the defendant after the day of the hearing. In order the better to prevent any collusion between parties to the suit, Article 27 says that "it shall be lawful for the "Ministère Public, *at any stage* of any Ma- "trimonial case *before* the Divorce is *actually* "pronounced by the Court, to move the "Court to stay proceedings in order that evi- "dence be produced by the Crown to shew "either *collusion* or *fraud* or that the plain- "tiff has, by *his own offence* or conduct, estop- "ped himself from claiming the privilege of "the law" This clause, as well as clause 15, is evidently borrowed from the statute above referred to.

The reasons for this provision cannot be better expressed than in the words of Lord Stowell in the case of Beeby v. Beeby, I, Hag: Ex: 789 referred to by Bishop, "Law of Marriage and Divorce" Vol. II Chap. V, p. 76 § 76.

"The doctrine ,, observes Lord Stowell, "has its foundation in reason and property. "It would be hard if a man could complain "of the breach of a contract, which he has "violated; if he could complain of an inju- "ry, when he is open to a charge of the same "nature. It is not unfit, if he who is the "guardian of the purity of his own house "has converted it in into a brothel, that he "should not be allowed to complain of the "pollution which he himself has introduced; "if he who has first violated his marriage "vow, should be barred of his remedy; the "parties may live together and find sources "of mutual forgiveness in the humiliation of "mutual guilt. Such parties are suitable and "proper companions for each other." (Chancellor Walworth in Wood v. Wood, 2, Parge: 108; C. III) quoted by Bishop, "loco citato."

The Ministère Public is empowered to prove that the plaintiff has, by his own offence or conduct, estopped himself from claiming the privilege of the law, in the interest of public morality and of a proper administration of justice.

When the Ministère Public shall have been successful in proving the facts alleged, it is undoubtedly the duty of the Court to consider most carefully whether the facts amount to such offence or conduct as to estopp him from claiming the privilege of the law.

We hold that the evidence produced by the Crown, in this case, clearly proves the plaintiff to have committed repeated acts of adultery with various women of the lowest class, pending his marriage; and we think that in this case the plaintiff's conduct has been such that he has barred himself from claiming the remedy of the law for the misconduct charged against the wife.

This action is, therefore, dismissed with costs, including those of the Crown.

BAIL COURT.

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APPEAL FROM A CONVICTION OF THE SENIOR DISTRICT MAGISTRATE OF PORT LOUIS, SITTING AS MARINE MAGISTRATE,—CRIMINAL INFORMATION,—ERRONEOUS DATE STATED THEREIN,—ARTICLE 25 OF ORDINANCE No. 29 OF 1853,—INSUFFICIENCY OF THE EVIDENCE ADDUCED,—ARTICLE 123 OF ORDINANCE No. 35 OF 1852,—NON-PRODUCTION OF A LOG-BOOK.

Ruled by the Court that a criminal information cannot be held to be insufficient for omitting to state the exact time at which an offence had been committed, in any case where "time" is not of the essence of the offence.

—

EDWIN WOOD,—Appellant

versus

THE QUEEN,—Respondent.

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Before

His Honor Mr. JUSTICE BESTEL, First Puisne Judge.

—

F. MATHEWS,—Of Counsel for Appellant.
E. MARGEOT,—Attorney for the same.

L. COX,—Acting Substitute Procureur and Adv. Gen ,—Of Counsel for Respondent.
J. BOUCHET,—Queen's Attorney.

—

17*th June* 1874.

(Appeal from *Conviction* of Senior District Magistrate of Port Louis, sitting as Marine Magistrate.)

In considering this appeal, I have found no reason for changing the conclusion I had come to when it was argued before me.

Several grounds of appeal are stated in the notices of appeal, but on argument great stress was laid 1o. as to an erroneous date having been stated in the complaint. Were the reasons given by the Magistrate for his ruling insufficient, it must not be forgotten that by the Criminal Law of England and that of the Colony, a criminal information or complaint is not to be held to be insufficient for *omitting to state the time* at which the offence was committed, in any case *where time is not of the essence of the offence;* nor for stating the time *imperfectly*, nor for stating the offence to have been committed on a *day subsequent to the filing* of the information, or any *impossible* day, or on a day that *never happened.* (Article 25 of Criminal Procedure Ordinance, No. 29 of 1853. Article 123 of District Magistrate Ordinance, — Criminal Side)

2o. The insufficiency of the evidence complained of, and the contradictions stated to exist in that evidence are mere allegations and cannot and ought not to shake the conclusions of the Court below.

3o. The non-production of the Log-Book, complained of, is the work of the Master, now the appellant, in whose custody it was. He might have produced it, if he had chosen to do so, and with the help of the entry therein he might have protected himself from the Conviction he now complains of.

Besides, his keeping it back might lead to the inference that the entry was anything but satisfactory, and might have endangered his defence.

Be that as it may, he must blame himself for not having produced his Log-Book and for any unfavorable inference to be drawn from the non-production thereof. The duty of the Court is to maintain the Conviction appealed from and this appeal is, accordingly, dismissed with costs.

BAIL COURT.

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APPEAL FROM A JUDGMENT OF THE SENIOR DISTRICT MAGISTRATE OF PORT LOUIS,—CIVIL AND COMMERCIAL PARTNERSHIP,—CONTRACT,—ARTICLES 1862 & 1864 OF THE CIVIL CODE,—"RAISON SOCIALE"—"CODE DE COMMERCE",—ART. 22.

Held by the Court that, in virtue of Articles 1862 *and* 1864 *of the Civil Code, a partner could not, without an express or implied authority from his copartners, dispose of the Partnership property except for a valuable consideration, and, in order that the Partnership should be bound by a contract entered into between one partner and a third party, that contract, under the Commercial Law, must be signed in the name of the Partnership.*

—

HINNEKINDT,—Appellant

versus

NAYNA,—Respondent.

—

Before

His Honor Mr. Justice BESTEL, 1st Puisne Judge.

—

W. NEWTON,—Of Counsel for Appellant.
J. GUIBERT,—Attorney for the same.

E. GALLET,—Of Counsel for Respondent.
HITIÉ,—Attorney for the same.

—

17*th June* 1874.

The rule of law is that a partner has no right to bind the partnership, without an express or implied authority to that effect from his copartners; without this authority, any contract, made with one of the partners even for, and on account of the partnership, binds the contracting partner only, unless the partnership has derived any advantage from the contract so entered into by one of its members.

Such is the rule laid down in Articles 1862, 1864 of the Civil Code, with regard to civil partnership.

With regard to commercial partnership the rule is to be found in Article 22 of the "Code de Commerce," which runs thus: Les associés en nom collectif indiqués dans l'acte de société sont solidaires pour tous les engagements de la société, encore qu'un *seul* des associés ait signé, pourvu que ce soit *sous la raison sociale.*"

Whether I apply to this case the rule of the Civil Law, or that of the Commercial Code, I cannot fail to come to a conclusion, fatal to the respondent's case.

The stipulation of Duclos of paying the beef supplied to him personally for his own and family's use, by timber to be taken from the partnership yard, has never been sanctioned by the partnership (art. 1862 C C.) and could not be sanctioned by Chauvet, the manager of the timber yard, who without any authority from *all* the partners, whether express or implied, could not dispose of the partnership property except for a valuable consideration. The evidence shews no express or implied authority; besides an authority to the contrary from one of the partners only, to the manager would be insufficient to warrant his departure from his duty as a manager of the Company's property.

The partnership has, for sure, derived no advantage whatever from the special contract between E Duclos and his butcher Nayna, and cannot, therefore, be bound by the contract between E. Duclos & Nayna (art. 1864 C. C.)

In order that the partnership should be bound by E. Duclos' contract with Nayna, under the Commercial Law, it should have been signed in the name of the partnership which has not been alleged and still less attempted to be proved (art. 22 Code Commercial)

The appeal is, accordingly, allowed with costs against the respondent.

SUPREME COURT.

—

DEMAND IN HOMOLOGATION OF A DEED OF PARTITION,—BILLS OF COSTS,—REDUCTION OF THE SAME.

—

GILOT & WIFE,—Plaintiffs.

versus

SALESSE & OTHERS,—Defendants.

—

Before

His Honor Sir C. FARQUHAR SHAND, Knight, Chief Justice, Judge, and

His Honor Mr. JUSTICE BESTEL, First Puisne Judge.

—

G. GUIBERT,—Of Counsel for Plaintiffs.
L. C. RODESSE,—Attorney for the same.

—

(Homogation of a deed of Partition.)

—

19*th June* 1874.

In this deed of Partition reference is made to certain costs, which are to be paid abroad; the amount of these costs is not fixed by the deed of Partition, nor is it therein stated to whom they are to be paid.

This would be a good ground for the Court refusing the homologation prayed for of the deed of Partition.

However, this irregularity is, somewhat, cured by the production of the bills of costs in the deed merely referred to, and the Court is now in possession of the names of the parties entitled to those costs.

With a view of not further needlessly delaying parties from the enjoyment of their several shares, we shall and do hereby homologate the said deed of Partition, in limiting the costs due to Mr. attorney Rodesse to the sum of £39.0.10, and to Mr. notary Pelte to the reduced sum of £30.

Bills of costs to be annexed to the record.

ACTION FOR REDDITION OF ACCOUNTS,—ACCOUNTS OF A PARTNERSHIP,—PRIVATE ACCOUNTS OF PARTNERS,—ORAL EVIDENCE,—CUSTOM OF THE PLACE.

The Court ruled that in this case advances made to partners individually were not a debt of the partnership and rejected oral testimony tending to establish a contrary understanding between parties. The Court ruled further that nothing shows it to be the custom of this place for commissioners and planters to strike accounts on the 1st March each year.

—

ERNEST DUVAL,—Appellant

versus

EDWARDS & J. ROUGÉ FILS,—Respondents.

—

Before

His Honor Sir C. FARQUHAR SHAND, KT., Chief Judge and

His Honor Mr. JUSTICE BESTEL, First Puisne Judge.

—

P.L. CHASTELLIER,—Of Counsel for Appellant
F. VICTOR,—Attorney for the same.

E. PELLEREAU,—Of Counsel for Respondents.
E. EDWARDS,—Attorney for the same.

—

7th August 1874.

This was an action for reddition of accounts. The plaintiff and Alfred Besnard were joint-owners of the Estate "Clairfond" and had been in the habit of sending their sugars to the defendants in Port Louis for sale.

The plaintiff who now sued in his own right, as well as holding the ceded rights of Besnard, alleged that the sugars of three crops had been so entrusted to the defendants, amounting to a total of 21,493 weighing about 3,294,000 pounds of sugar, and he called for a proper statement of the whole account, that the true balance existing between the parties, might be ascertained and settled.

The defendants stated their readiness to furnish accounts, but at the outset they denied that Besnard had made a *bonâ fide* transfer of his rights so as to defeat any claim of set off which the defendants might have against him. Ultimately, this plea was not insisted on.

On hearing Counsel and by consent of parties, the Court ordered the case to be referred to the Master to compute accounts, and report to the Court.

After discussion before the Master, as the defendants had not been able to satisfy him of an alleged contrary intention and understanding of the parties, the Master decided that all the sums paid to Duval and Besnard, for their individual personal use, should not figure in the general account of the Estate "Clairfond", but in the respective private accounts of Duval and Besnard; further, that the real and final balance on behalf of the Estate "Clairfond" once ascertained, should be divided into two equal shares, the one accrueing to Duval, and the other to Besnard, and that the private debts of each of them should be deducted from his own share.

The Master found that the balance on behalf of the Estate was $30,500: of this half being put to the credit of each partner left, after taking their private account with the defendants into calculation, the sum of $10,239.26 due by the defendants to Duval, and the sum of $2,943.18 due by Besnard to the defendants.

The plaintiffs acquiesced in this report. The defendant appealed to the Court and maintained the following grounds of objection and defence;

1o. Because the two sums of four thousand dollars and five thousand and five hundred dollars and fifty six cents, borne down by the Master to the debit of the personal account of Besnard, should be put to the debit of the account of "Clairfond" The defendants lent money to or made payments for either Besnard or Duval, simply because the sugars of "Clairfond" were consigned to them as commissioners and on the credit of these sugars; and they were authorized to include in the account of "Clairfond," and to its debit, all sums so lent or paid by them, leaving Duval and Besnard, when they should settle their accounts together, to take into consideration their personal and social debts; otherwise the defendants would never have advanced monies to either Duval or Besnard personally. There was, in this respect, an understanding between all parties which results from all the vouchers and documents produced; and the defendants are entitled to supplement this proof by oral testimony, or if these vouchers and documents be not considered as a beginning of proof in writing, to adduce oral tes-

timony to show the understanding and the mode of proceeding of parties.

2o. Because, even if the Master were right in rejecting the above sums from the account of "Clairfond," his mode of operating is incorrect. The proper one would be, to state the accounts of all parties, on the first of March in each year, as is usually done, to include in the account of "Clairfond," for each year the value of the sugars received from the crop of that year, and after striking the balance, to transfer the half of such balance to the personal accounts of Duval and Besnard, which would give a very different result from that obtained by the Master, and is the proper and usual one to follow between Planters and Commission Agents, and this the defendants asked to be allowed to prove by oral testimony.

3o. Because there are many items of monies furnished or payments made for the exclusive benefit of Duval, which the Master has left in the account of "Clairfond," and which, if the Master's mode of operating is correct, should be struck out and laid to the personal account of Duval, to wit;

1864.

Août 13	payé à	Duval sur mandat	$ 200.00
Oct. 18	„	Duval sur mandat	400.00
Déc. 1er	„	Duval sur reçu ..	175.00
Déc. 15	„	Duval sur reçu ..	200.00
Déc. 30	„	Duval sur recu ..	1270.00

1865.

Jan. 20	payé à	Duval sur reçu ..	$ 240.00
Mai 1er	„	Duval sur reçu ..	250.00
Juin 6..	„	Duval sur reçu ..	292.06
Sept. 19	„	Duval sur reçu ..	200.00
Oct. 27	„	Duval sur recu ..	400.00
Déc. 22	„	Duval sur reçu ..	100.00

1866.

Jan. 13	payé à	Duval sur reçu ..	$ 120.00
Jan. 20	„	Duval sur reçu ..	159.83
Fév. 10	„	Duval sur reçu ..	689.25
Mars 28	„	Duval sur reçu ..	271.50
Juillet 23	„	Duval sur reçu ..	200.00
Sept. 4.	„	Duval sur reçu ..	100.00
		Total.....	$ 5,267.64

Farther, the interest ought to be calculated on each and every of the said sums, in the same way as the Master has done for the several items by him struck out from the account of "Clairfond" and borne down on the private account of Besnard.

And the total amount of the aforesaid sum of five thousand two hundred and sixty seven and sixty four cents, together with the interest thereon calculated as above explained, will be borne to the debit side of the private account of Duval, and the balance of the said private account be set off against the balance due to Duval on the account of "Clairfond."

These different points have been fully argued before us, and we shall now dispose of them in their order.

As to the *first* objection, we agree with the Master in his opinion that there is no evidence of the defendants being authorized by Duval and Besnard to include in the account of the partnership, the advances made by them to the partners individually. Every presumption and indeed all the evidence on this case is the other way. As to the admission of oral evidence with a view of establishing the allegations here made, that cannot be allowed. There is no "commencement de preuve par écrit," and the proposal is just an attempt to prove by parole testimony the existence of a debt far above the statutory limitation.

2. We are not aware of any authority on which we could change the mode of stating the accounts adopted by the Master for that here suggested by the defendants. There was no stipulation by the parties for the stating of annual balances, at a certain fixed date, and their course of dealing, during the whole period of their business relations, was inconsistent with any such arrangement or understanding.

3. In the argument before us no special reasons with reference to any of the items have been stated for our interfering with the Master's Judgment as to the sums here referred to. There was merely a general objection to the Master's judgment, pronounced, it must be remembered, after hearing parties and on inspection of the papers and vouchers produced before him.

We see no cause for interfering with his opinion and removing the amounts in question from the account with the Estate, to the personal account of Duval.

We agree with the Master that interest at 9 *per centum* ought to be allowed for five years as stated in his Report. Judgment will therefore be entered in terms of the Master's final Report. Looking at the nature of the case and the result arrived at, we think the plaintiffs are entitled to have ½ the amount of their taxed costs against the defendants.

SUPREME COURT.

—

"WRIT OF MANDAMUS",—ISSUING OF THE SAME,—INSPECTION OF PROCEEDINGS IN DISTICT COURTS BY AN INTERESTED PARTY,—AFFIDAVITS,—ARTICLES 118 & 119 OF ORDINANCE No. 35 OF 1852.

In this case a motion was made for a Rule to shew cause why a "Writ of Mandamus" should not issue against a District Magistrate to permit an attorney to inspect and copy the proceedings in a case where his clients had been convicted to six months imprisonment. The Court, after carefully taking into consideration all the facts of the case, came to the conclusion that the "Writ of Mandamus" could not be granted, as the cause for which the inspection was required was not such a one as would warrant the issuing of the same, and thus cast upon the Magistrate a duty which the law does not require.

—

In re:

BABOA & VENCATACHELLUM,—Applicants.

—

Before

His Honor Mr JUSTICE BESTEL, First Puisne Judge and

His Honor Mr. JUSTICE GORRIE, Second Puisne Judge.

—

G. PILOT,—Of Counsel for Applicants.
J. H. ACKROYD,—Attorney for the same.

"Writ of Mandamus."

—

12th August 1874.

Pilot moved the Court for a Rule to shew cause why a "Writ of Mandamus" should not issue against Mr. J. G. Daly, the Magistrate of Grand Port, and Mr. Byrnes, District Clerk, to permit the plaintiffs' attorney to inspect and copy the proceedings in a case where the parties had been convicted of theft and sentenced to six months imprisonment.

He supported his motion by an affidavit by the attorney J. H. Ackroyd, in which he stated that his object was to see whether his clients had been justly convicted.

After argument, the Court delivered on the Bench the following judgment.

Mr. Justice Bestel. This is a case where the counsel has stated at the Bar that the persons convicted had not received any summons, or any copy of the charge against them before the trial. That is not in the affidavit, but if he can obtain an affidavit to a fact of this kind, or any other fact tending to shew that justice has not been done, we shall willingly open our doors to ascertain whether the allegation is true, and if so, whether that is a ground for a "writ of certiorari"; but we do not see our way to grant this Rule for a "writ of mandamus," as the cause for which the inspection is required is not such a cause as we can grant our writ to compel the Magistrate to allow the inspection, and thus to cast upon him judicially a duty which the law does not require.

Mr. Justice Gorrie. I quite concur. The accused before the Court of the District Magistrate may be defended by Counsel or Attorney. These people were not so, but having employed an attorney subsequently, that gentleman by his affidavit says he wishes to inspect the proceedings to see whether his clients were justly convicted. The law requires the Magistrate to give a copy of the Conviction if there is an appeal, or for any sufficient cause, such as those set forth in the quotations from Taylor cited at the Bar, but is a Magistrate bound to submit the proceedings to an attorney who has been retained subsequent to the case, to see whether he cannot discover some technical ground of appeal, or rather, are we bound to issue a "writ of mandamus" to compel the Magistrate to do so? What is really wanted here is to get at the Magistrate's notes of the evidence, there being no appeal to us on the question of fact, and it never having been decided in this Court that the Magistrate's notes form part of the technical Record The "writ of mandamus" is never issued upon slight cause, but here it is applied for to assist the attorney in picking holes in a procedure which is intended by the law to be summary and final.

No ground of appeal is stated; if it had been, the Magistrate would at once have granted a copy of the Conviction; no ground for our interference by "certiorari" is stated, but we are to assist the attorney by "mandamus" in seeing whether or not, there may be a ground. This is not a sufficient cause for our interference with the Magistrate's discretion. We are bound to presume everything has been done properly and legally, un-

til some substantive allegation is made to us to the contrary, when we shall interfere by means of the proper writ.

Mr. Justice Bestel. Pilot will take nothing by his motion.

BAIL COURT.

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APPEAL FROM A JUDGMENT OF THE DISTRICT MAGISTRATE OF SEYCHELLES,—MINORS,—DEED OF SALE,—ACTION TO HAVE IT SET ASIDE AS NULL AND VOID,—PRELIMINARY PLEAS, — RECORDS, — UNSATISFACTORY MODE OF DRAWING THEM UP.

The Court, in presence of the unsatisfactory manner in which the Magistrate had drawn up his Record, quashed the judgment under appeal and sent back the whole case to the District Judge to hear parties anew, and to give his reasons for his decision when pronouncing Judgment.

Costs, in the meanwhile, reserved.

—

CORGAT,—Appellant

versus

POUSSOU & OTHERS,—Respondents.

—

Before

His Honor Mr. Justice GORRIE, Second Puisne Judge.

—

E. PELLEREAU,—Of Counsel for Appellant
J. H. ACKROYD,—Attorney for the same.

W. NEWTON,—Of Counsel for Respondents.
G. NEWTON,—Attorney for the same.

—

18*th August* 1874.

After this case was heard so far back as February last, I was asked to delay giving judgment as some information was expected from Seychelles with relation to one of the grounds of appeal. No further information has been received, and I have anxiously considered the proceedings with the view of giving a definite judgment so as to save the parties further expense.

I find however that this is impossible from the unsatisfactory mode in which the final decision of the District Judge has been given.

The plaintiff of the action is the holder of the rights of three persons, named d'Argent, now major, who in their minority obtained a bequest of a certain considerable portion of land at Seychelles from Widow Hoareau. The father of these minors, while acting as the administrator of his children, sold a portion of the Estate to one Rosette Ropant by notarial deed.

Rosette Ropant, in her turn, bequeathed the portion so sold to the twelve or fourteen persons in whose rights the defendant Corgat now stands.

The object of the action is to have the notarial deed of sale to Rosette Ropant set aside, and also certain other deeds by which the property was divided amongst her legatees in kind.

A great number of separate preliminary pleas were taken in defence, and one after another was disposed of by the Magistrate, a fresh preliminary plea being always ready and permitted to be pleaded, after the District Judge had given his decision on those heard. The result is that the Record is prolix and most difficult to be understood.

The legal points involved in the merits of the case are numerous and important, but the Magistrate simply finds for the plaintiff without any reason whatever for his judgment, and indeed without any intelligible record of the pleas in defence.

On the appeal the case was argued with great ability by Newton and Pellereau for the appellant and respondent respectively, and by Wilson for an interested party, and if I could with satisfaction to myself, or to the interests of justice, have given a final judgment on the appeal, I should certainly have done so. But I find this impossible in the position of the Record, and I therefore quash the judgment under appeal and remit the whole case back to the District Judge to hear parties anew on the merits of the cause, and in pronouncing judgment to give his reasons in order that if any further appeal be taken, the Court may be in a position to properly exercise its appellate power.

Costs meanwhile reserved.

BAIL COURT.

—

APPEAL FROM A JUDGMENT OF DISTRICT MAGISTRATE OF SEYCHELLES ORD. 28 OF 1866, §§ 16 & 49,—RECORD OF CRIMINAL CASE IN A CIVIL CASE.

Held by the Court that in a Bond by the words "shall obey and keep every law and regulation relating to the distillation of spirit" something more than the mere working or operation of distilleries was meant.

Held likewise that the record of a criminal case against the principal—was properly introduced as evidence in the civil cases against the principal and his securities.

—

F. SAVY, C. DUPUY & A. GEBERT,—Appellants

versus

CIVIL COMMISSIONER OF SEYCHELLES,—Respondent.

—

Before

Hir Honor Sir C. FARQUHAR SHAND, Knight, Chief Judge.

—

W. NEWTON,—Of Counsel for Appellants.
J. PINÉGUY,—Attorney for the same.

L. COX, Acting Substitute Procureur & Adv. General. } Of Counsel for Respondent.
J. BOUCHET,—Attorney for the same.

—

15*th September* 1874.

This was a case involving two appeals from a judgment of the District Magistrate of the Seychelles Dependencies.

The facts were the following: In terms of sections 16 and 49 of Ord. No. 28 of 1866 "to amend and consolidate the laws on distilleries." Ferdinand Savy, landowner in Fregate Island, one of the Seychelles group and a distiller there granted bond to Her Majesty with two securities, Messrs. Charles Dupuy, merchant of Mahé Seychelles. and Adolphe Gebert, landowner of the same place in the following terms: "know all men by these "presents that we Charles Dupuy and Adol- "phe Gebert, both proprietors are jointly and "severally held and firmly bound into our "Sovereign Lady the Queen, in the sum of "five hundred pounds of lawful money of "this colony for which payment to be well "and faithfully made, we bind ourselves and "each of us or the same shall be levied on "our and each of our goods and chattels, "lands and tenements to the use of our So- "vereign the Queen, her heirs and successors "by way of recognizance in case default shall "be made in any of the conditions of such "recognizance the conditions whereof are: "that of the said Ferdinand Savy who shall "receive a license to distill spirits in the dis- "tillery, at Fregate Island, during the half "year ending the 30th September 1873, do "and shall obey and keep every law and re- "gulation relating to the distillation of spirits "as far as they concern him. Then such re- "cognizance shall be void, otherwise the same "shall continue in full force. Signed before "me, this thirty first day of March 1873.

"W. H. Franklyn."

"Good for five hundred pounds sterling— "A. Savy, p. pr. Fd. Savy.

"Good for five hundred pounds sterling— "Chs. Dupuy.

"Good for five hundred pounds sterling— "A. Gebert."

On the 27th February 1873, a plaint with summons was raised against these parties in the District Court of Seychelles, by William Hales Franklyn, Esquire, Her Majesty's Chief Civil Commissioner of Seychelles, setting forth that Ferdinand Savy, one of the defendants was on the first day of April 1873, licensed as a distiller of spirits: That in compliance with Art. 16 of Ord. 28 of 1866, the said Ferdinand Savy did on the 31st March 1873 give a Bond (Bond recited as above.)

That the said Ferdinand Savy has not duly obeyed and kept every law and regulation relating to the distillation of spirits. That on the 9th day of December 1873 the said Ferdinand Savy was discovered to have illicitly concealed on his premises a large quantity of Rum. That the said Ferdinand Savy did thereby infringe Art. 7 of Ord. 28 of 1866. That he was prosecuted for the said offence, convicted of the same and by a judgment of the District Court of Seychelles under date the 22nd December 1873, sentenced to pay a fine of two hundred pounds. That again, on or about the 7th December 1873, the said Ferdinand Savy did illicitly remove a large quantity of rum. That he did thereby again infringe Art. 7 of Ord. 28 of 1866. That he

was prosecuted for the said offence, convicted for the same and by a judgment of the District Court of Seychelles under date the 23rd December 1873—sentenced to pay a fine of £50. That on account of the said infraction of the law, the Bond subscribed by defendants has become due and can be enforced; That defendants therefore stand indebted to Her Majesty the Queen in a sum of five hundred pounds. Therefore the plaintiff prayed for a judgment declaring the said Bond is forfeited, that the said sum of five hundred pounds is due and condemning defendants jointly and severally to pay to plaintiff the said sum of five hundred pounds with all costs of suit.

The case came on before the Magistrate on the 12th and 16th March last, when after certain preliminary objections taken by the defendants had been repelled, the defendants pleaded on the merits. 1o. not indebted. 2o. the general issue. The plaintiff was allowed to put in the criminal Record of the convictions of the defendant although the defendant contested the competency of doing so in a civil demand, and parole evidence, through objected to, was allowed and taken at considerable length by the plaintiff.

The Magistrate on 24th March last adjudged that the plaintiff should recover against the defendant the sum of £500 and £19.15.4 of costs, said costs against Savy alone.

All the parties appealed—Savy in one appeal for himself—Dupuy & Gebert for themselves in another appeal. It was argued:

1o. The Ord. of 1866 applies to many things besides *distilleries*

It is divided into separate chapters forming distinct Codes on the subject embraced in them. Such a bond as was granted in the present case only covers matters falling under chapter 2nd particularly under § 16 when the penalty is to be incurred in failure of the due observance of the laws and regulations relating to "distillation" of spirits.

2o. Before the offences could have been committed, the license of Savy had expired so he was no longer a distiller and cannot be liable under the Ordinance.

3o. So far as one of the charges is concerned it has not in any sense the illegal removal contemplated in the Ordinance i. e. illegal removal from a distillery, but in fact it was only removal from one island to another, which is not within the law.

4o. The prosecution relied on the documents produced connected with the criminal convictions. This was irregular. In this civil inquiry those documents should only have been allowed to be produced in evidence that such trials actually took place.

JUDGMENT.

A Court of law will not be disposed to extend the operation of the Bond subscribed by the Appellants beyond its fair object and intendment; but at the same time it must receive fair play. I am of opinion that to confine its effect to the sole case of an infringement of the law as to the mere *operation of distilleries*, is much to rigid an interpretation. If a case of illegal removal of spirits by a distiller has been established here,—that will be enough to entitle the Crown to recover.

2o. It is true that the license of Savy as a distiller had expired before the alleged illegal removal of spirits had been discovered and of course before the question was tried by the District Magistrate. But it is established that the distillery was sealed up at once when his license expired viz: on the last day of September 1873—so that he could not have abstracted the rum from the distillery, after his license had expired. Besides we have Savy's own statements made to the witnesses that he had clandestinely removed the rum, little by little, while he had licenses and while the distillery was open and working. In truth the present case really resolves itself into a question of evidence.

Has the Crown been able to prove the charge as laid against Savy? I am of opinion that the charge has been established. It must be observed that the proceedings in the prosecutions for the penalties are produced in the inquiry and very properly produced, there is new distinct and substantive evidence, adduced in this case itself, of the highest importance. It is shown that the officers confronted the appellant Savy on the spot. That he at first denied that he had any rum in his possession; at the outset he gave a statement as to the nature of the liquid in the jars, altogether untrue. He then substantially confessed the charge. He admitted that Mrs. Campbell had been at Fregate Island, and had illegally got rum from him 2 or 3 days before It is shown that it was seized and condemned in her custody and on its way to her premises and in one of the casks of rum found concealed on his premises, the deficiency was exactly of the same amount as that of which Mrs. Campbell was found in possession The whole circumstances from first to last conspire to substantiate the case of the crown It will be remarked that severaly the casks found full of rum and concealed in the cellar of his dwelling

house and in the pavilion attached to the identical casks which, during the time of his last license, had been in the Queen's wharehouse at Mahé, at a long distance from Fregate Island and had been refilled since their return to Fregate Island, and before the distillery was closed and put under seals, at the end of September last. In short rum in a considerable quantity is found in his possession, without any lawful authority, in fact confessedly smuggled from the distillery and shewn to have been abstracted while he held his license.

A distiller in such a position cannot surely be said in the words of the Bond now sued upon, to have obeyed, and kept "every law "and regulation relating to the distillation of "spirits, so far as they concern him."

The judgment below is affirmed in both cases, and the two appeals will stand dismissed, with costs.

BAIL COURT.

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The Court quashed the judgment appealed from, unsupported as it was by sufficient evidence and held that in the case of a prosecution for wilfully selling adulterated wine or liquor, guilty knowledge on the part of accused must be proved.

—

AH-HANG,—Appellant*

versus

THE QUEEN,—Respondent.

—

Before

His Honor Mr. Justice GORRIE, Second Puisne Judge.

—

L. ROUILLARD,—Of Counsel for Appellant.

L. COX,—Acting Subst. & Adv. General for Respondent.

—

15*th June* 1874.

*This was an appeal from a conviction of the acting District Magistrate of Savanne who had sentenced the appellant under Art. 237 of the Penal Code to fifteen days' imprisonment and to fine of £20 for having sold and exposed for sale, wine adulterated with an ingredient hurtful to health.

ROUILLARD for appellant contended that the conviction was bad for the following reasons:

1o. That there was no legal proof adduced before the Court below of the alleged fact that the wine was adulterated by a substance injurious to health. That Dr. Baleguer, who gave information in the matter to the police was a discontented debtor of the Appellant. That Mr. C. Bernard who made the analysis of the wine swore, according to the record that "he experienced the wine without ill effects" and was asked to make a farther report which was not made. That Dr. Dardenne who declared the wine to the adulterated in a manner to be injurious to health, judged only from the taste of the wine and did not analize it and could therefore give no positive evidence in the matter.

2o. There was no evidence to show that his client had any guilty knowledge that the wine was adulterated in any injurious manner.

COX for respondent maintained that there was sufficient evidence for the Magistrate to condemn upon, and the Judge could not interfere unless there had been a miscarriage of justice. There was Dr. Baleguer's evidence showing that the wine was adulterated and had done him harm.

MR. JUSTICE GORRIE.—What do you say of this witness having sworn that he owed nothing to the shop and yet his bon was produced to show that he did.

COX.—The bon may have been paid.

MR. JUSTICE GORRIE.—The proceedings do not say so and this should have appeared if such were the fact.

COX.—Besides there is the evidence of Mr Bernard who swore that there were 29 bottles, whereof 27 was largely adulterated with campeche.

MR. JUSTICE GORRIE.—Campeche is log-wood—Port wine is said to be mixed with log-wood Are all those, who sell port wine liable to prosecution?

COX.—But Bernard declared that the wine was adulterated with a substance injurious to health and Dr. Dardenne's evidence is to the

* This case and the four following are reported from notes taken at the time, and submitted to the Judges of the Supreme Court for correction.

same effect. As to the point of his friend's client having no guilty knowledge—that the wine was adulterated the law does not require the proof that the person knew that the articles adulterated were so adulterated, that at all events the circumstances of the case were such that the Magistrate could very well consider that there was guilty knowledge.

JUDGMENT.

His Honor, the presiding Judge stated that the evidence was quite insufficient to show that the wine had been adulterated with an ingredient hurtful to health.—Dr. Baleguer's evidence was unreliable.

Mr. Bernard's evidence amounted to this that he had experienced the wine without ill effects and a report of his which was to have been put in was not forthcoming As to Dr. Dardenne, he merely tasted the wine and did not analyse it, and his evidence could not therefore be of any great weight in a case like this where a clear and positive opinion was required—Besides which there was no proof that he could see of guilty knowledge on the part of the appellants. The conviction must therefore be quashed.—

BAIL COURT.

—

The Court ruled that a party who binds itself to prosecute an appeal to its " conclusion *" is only bound to have the appeal prosecuted within the time fixed upon the law and that the principal sum in the bond is not necessarily forfeited if the judgment appealed be not reversed.*

Ruled further that the Supreme Court costs which the sureties are bound to pay, are the costs of appeal only and not the costs incurred in the Court below.

—

The Honorable PROCUREUR & ADVOCATE GENERAL & ANOR,—Plaintiff.

versus

POTAGE & ORS,—Defendants.

—

Before

His Honor Mr Juslice J. GORRIE, Second Puisne Judge.

—

L. COX,—Of Counsel for Plaintiffs.
BOUCHET,—Attorney for the same.

A. THIBAUD,—Of Counsel for Defendants.
E. EDWARDS,—Attorney for the same.

—

15th June 1874.

This was an action in which the plaintiffs sought to recover against the defendants the sum of £ 100 amount of a Bond given for an appeal entered from a judgment of the District Magistrate of Grand Port, who had condemned Duval & another to £ 20 for trespass on Crown Lands, they appealed and the present defendants were sureties, the conditions of the Bond were by law, that it should be for the amount of the sum for which the parties were condemned and the costs, and the condition was that the parties appealing should prosecute the appeal to its "*conclusion*" before the Supreme Court and pay such costs as the Supreme Court should award.

Cox for Plaintiff contended that prosecuting an appeal to its conclusion meant getting the judgment reversed, otherwise parties would get a long delay and might make away with their property. That the bond had been forfeited in this case, that is the full sum named in the bond, for the sureties (the now defendants) had not even paid these costs when summoned so to do, after the principals had made default in so doing. It is true they tendered the money after the action, had been entered against them, but then it was too late, the bond had been forfeited.

Thibaud for defendants contended that the terms of the Bond were that the appeal should be prosecuted to its conclusion within the legal delays, and costs paid. In this case the appeal had been prosecuted to its conclusion, and within the fixed by law and by the bond. It was illogical to say that the "*conclusion*" meant the reversal of the judgment, it evidently meant the final judgment of the Court of Appeal. The securities were bound only for the costs incurred in the Court of Appeal and although these costs were tendered after the present action was entered, there was no delay fixed for the payment of these costs and therefore the Bond was not forfeited.

The Honorable Judge presiding, decided, that he could not stretch the Bond beyond its strict meaning and this was that the appeal should be prosecuted to its "*conclusion*" not the reversal of the judgment,—and

s to the costs incurred in the Court of Appeal lthough they had been tendered rather late as they ought to have been paid at once) till they had been tendered before judgment, e would therefore give judgment for the mount of the costs of Appeal (nearly £ 10) ith costs in this action up to the time of the nder,—observing also that as the money ad been tendered and refused it ought to ave been deposited in Court.

COURT OF ASSIZES.

—

Ord. No. 29 of 1853—Art. 33.

In this case the criminal information contained two counts one for a felony and the other for a misdemeanor. The Court using its discretionary power, restrained the prosecutor to the proof of either the felony or the misdemeanor

—

THE QUEEN

versus

LUCHMUN, RAGHOO & Ors.

—

Before

His Honor Mr. Justice Bestel, First Puisne Judge.

—

Hon. G. B. Colin,—Of Counsel for the [Crown.
W. Newton,—Of Counsel for Accused.

—

26th September 1874.

Newton before prisoners pleaded—took an exception to the criminal information. He said the information contained two counts: one charging the prisoners with committing a larceny at night by means of breaking, and the other charging them with inflicting wounds and blows upon the persons robbed.

The first charge was one of crime and the second a misdemeanor. He quoted from Archbold to show that you could not include a felony and a misdemeanor in the same indictment. Now in Mauritius we had not what was properly called a felony, but a felony answered to what our law called a crime. The word felony was found in our Criminal Procedure Ordinance but only there, but still he thought it was a sound argument to say that if in England a felony and a misdemeanor could not be put in an information, here a crime and a misdemeanor ought not to be put in the same information. It might embarrass the defence, if different sorts of offences were put in the same information. It was true that under our Criminal Procedure Ordinance the Crown had the right to charge different crimes in the same information. This only showed that the law was against the including of several offences in one information, and when it allowed it, it did so in express terms.

The Procureur & Advocate General in answer pointed out that the only effect of this objection if allowed would be that a separate information be filed for each offence, although they might be connected the one with the other, thus there would be two trials which would create great expense and inconvenience. He admitted that practically speaking a felony and a crime must be considered as the same in Mauritius, and added that the word felony had crept in our law probably by error. The law did not prohibit what had been done in this case, and there was a dictum of Archbold on the matter, that even in England there was no absolute decision declaring this illegal. Besides in England the circumstances are different, for indictments for crimes came before the Grand Jury, but informations for misdemeanors were filed ex-officio by the Attorney General, and therefore it was quite right not to mix them up because it might give rise to confusion. Here there was nothing of the kind and nothing to prevent a jury trying both matters. Since our law allowed the same information to include two different crimes there could be no possible reason why a misdemeanor and a crime should not be included also. English precedents were very useful as a general rule, but as our system differed from that of England what might be good there would not always apply here.

JUDGMENT.

Our Criminal Procedure Ordinance (Art. 33) allows several counts for felony to be put in one information, but the Court at its discretion could restrain the prosecutor to the proof of one at the trial, *a fortiori* then the Court has the same power when the information charged not two crimes, but a crime and misdemeanor, in this case therefore without deciding upon the points argued, he would in the exercise of his discretion confine the prosecution to the proof of one of the charges.

SUPREME COURT.

—

Ord. 35 *of* 1852.—*Penal Code, Art.* 17.

Held by the Court that a mere memorandum by a District Magistrate, upon a warrant of commitment, that the term of imprisonment inflicted by him was to reckon only after expiration of another term of imprisonment, was no legal authority for detention of the prisoner.

Q. Can a District Magistrate order imprisonment to commence only at a subsequent date ?

—

Ex parte :

JOSEPH CARME.

—

Motion on a writ of Habeas Corpus.

—

E. PELLEREAU,—Of Counsel for Applicant.
L. COX, Acting Substitute Procureur and Advocate General,—As Ministère Public.

—

Before

His Honor C. FARQUHAR SHAND, Knight, Chief Judge,

and

His Honor MR. JUSTICE J. GORRIE, Second Puisne Judge.

—

30th September 1874.

It appears that Joseph Carme had been sentenced by the Court of Assizes to a period of imprisonment which had terminated, and he was now detained upon a conviction of the Acting Police Magistrate who had sentenced him in April last to three months' imprisonment, which period had also expired, but there was a memorandum on the warrant of commitment stating that the three months would begin to run only after the expiration of the sentence of the Court of Assizes.

The judgment of the Acting Police Magistrate made no mention of the period from which the execution of the sentence was to run.

Pellereau moved that the prisoners be discharged there being no legal cause for his detention.

Cox, as Ministère Public, left the case in the hands of the Court.

The Court without deciding the question whether a District Magistrate had power or not to stay execution of his judgment until after some other condemnation to imprisonment had expired, ordered in this case, the immediate release of the prisoner, as the memorandum was no legal authority for his detention.

SUPREME COURT.

—

The Court decided that in an action in divorce for desertion, under Ord. No. 14 *of* 1872 *the five years were to reckon from the date of the desertion and not from the date of promulgation of the Ordinance.*

—

GUILLARD THE WIFE,—Plaintiff

versus

GUILLARD THE HUSBAND,—Defendant.

—

A. THIBAUD,—Of Counsel for Plaintiff.
ELIE,—Attorney for same.

Defendant left default.
L. COX,—As Ministère Public.

—

1874.

In this case, which is a suit for divorce *a vinculo matrimonii* for desertion under Ordinance 14 of 1872, Cox as Ministère Public says he considers it his duty to bring to the notice of the Court the fact that desertion alleged in this case was prior to the coming in force of the new Law on Divorce, and the law could not have a retroactive effect.

Thibaud.—Ordinance 14 of 1872 says nothing about waiting five years in order that it should come into operation.

THE COURT.

As Article 2 of the new Law, 14 of 1872, says that an action shall not be entered till five years after the desertion and says nothing about waiting for five years after the coming in force of the new Law, the case may proceed.

BAIL COURT.

—

STIPENDIARY LAWS,—ORDINANCE No. 7 OF 1865 ARTS. 1 & 2,—REGULATIONS OF EXECUTIVE COUNCIL SEPTEMBER 1869,—ART. 7.

The Court decided that the contract of service entered into between the Appelants and Respondent, a job-contractor, was null and void, because 1o. *the general bond to be given by the job-contractor and his surety had not been signed by the job-contractor, the principal obligant.* 2o. *The general bond ought to be signed by the job-contractor before entering into the contract of service with Immigrants, and not after, as in the present instance.*

The Court ruled further that Regulations by the Executive Counsel being regulations under an Ordinance ought to be read alongside with it.

—

CATHAN VELLEN & ORS,—Appellants.

versus

ARDÉ,—Respondent.

—

Before

His Honor Mr Justice GORRIE,—Second Puisne Judge.

—

WILSON,—Of Counsel for Appellants.
ACKROYD,—Attorney for the same.
GALÉA,—Counsel for Respondent.

—

30th September 1874.

In this case the Appellants are twenty three Indian labourers of a job-contractor who had been proceeded against by their Master before the Stipendiary Magistrate for neglect of work. An objection was taken to the regularity of the proceedings on the ground that the contracts of service were invalid as the general special guarantee bonds which are required in the case of job-contractors employing Immigrants were not signed by the job-contractor himself. The Magistrate overruled this objection, and proceeded to hear the case on the merits when the men were condemned to eight days' imprisonment and 15 days' wages forfeited for the benefit of Mr Ardé the job-contractor.

The appeal was made on the ground that the security Bonds were not signed by the job-contractor, that the charge was not precise and positive as to the cause of complaint brought against the appellants, and that the Stipendiary Magistrate in awarding a money compensation had done more than the complainant had asked him to do.

I find that it is only with regard to the general security Bond to be furnished by the job-contractor that the objections of the appellants can be said to have weight. The special bond furnished by the proprietor of the Estate on which the men worked appears to be in the form required by law. As to the general Bond it is to be given by the job-contractor and his surety, and in this instance, the proper form has been adopted, but the Bond is not signed by the job-contractor, the principal obligant.

The arguments of the counsel for Ardé that it did not require to be signed by him I regard as inadmissible; but the further argument was advanced that even if there had been any blunder it was one which could be cured by having a proper Bond executed anew, and second, that the only Bond really known to the law were the special Bonds by the owners of the Estate on which the men worked and that these were in this case in proper form and valid in every respect. The General Bond it was contended was not required in virtue of any Ordinance but only of Regulations by the Executive Council of 8th September 1869, and that in the case of Bachoo & or. *v.* de Belloguet, decided by the Supreme Court on 11th December 1872, it was clearly indicated that the law of the Colony apart from the Codes was to be looked for in the Ordinances and not in mere orders of the Executive. As regards the last argument I do not understand the case of Bachoo *v.* Belloguet to go the length of holding the Regulations above quoted to be generally beyond the power of the Executive.—They purport to be regulations under an Ordinance, and so far as they derive authority from that Ordinance, must

be read alongside with it. The Stipendiary Magistrate at all events would certainly not be justified in refraining from putting in force those regulations so long as they remain unrepealed, by any general considerations of the nature indicated by the Counsel for the Respondent, as the Stipendiary Magistrate must obey all lawful orders of the Executive in relation to the duties of his Office I find also that the Respondent himself has taken advantage of those Regulations by having the contracts with his laborers made out for a district and professing at least to give the general guarantee required by the Regulations. He is not able to enter into contracts of service with Indian Immigrants without specifying the Estate or property on which they were to work except under the authority of these Regulations and the contracts before me profess to be for a District generally, and profess also to be guaranteed by the General Bond. The Job-Contractor can scarcely now be heard when he argues against the legality of the Regulations under which he himself professes to stand.

That the special Bonds are good and valid does not do away with the obligation under the Regulations to guarantee the contracts by a General Bond. As to the policy or necessity for having this double guarantee, we, of course, in these Courts, have nothing to do. We can only endeavour to administer the Labour Law as we find it. On looking at the General Bond I find that not only it is not signed by the Job-Contractor as it ought to be, but the labourers have been engaged subsequent to it, and at various times during the year—the Bond thus preceding the Contracts which it professes to acknowledge and guarantee. This is not certainly what the Regulations intended and the Stipendiary Magistrate ought to have noticed such a fact, in addition to the special objection pleaded.

The Job Contractor contended that whether the Bond was given before or after, it was all one if it guaranteed the labourers' wages, but that begs the very question which the Stipendiary Magistrate is bound not to have left in doubt, viz., whether a Bond of this kind not signed by the principal obligant nor made in conformity with the Regulations professing to guarantee Contracts yet to be made and of which the terms could not therefore be known to the guarantor, could be legally valid.

The question however upon which the Counsel for the Job-Contractor chiefly relied was that admitting the General Bond to be bad, does that necessarily invalidate the contracts? He quoted the case of Bachoo v. de Belloguet, already cited, as showing that failure to obtemper Executive Regulations did not necessarily infer a nullity in the contracts themselves. The want of the General Bond it was argued was not created a nullity by the Executive Regulations and certainly there was no nullity for this reason under the general law of the Colony. Now we cannot expect that questions of this kind will not arise under the complicated labour system which has necessarily grown up in consequence of the Immigration of Indian labourers, and it is by no means easy to find a principle which can enable us to determine individual cases. In that of Bachoo v. de Belloguet, the Court ruled that the question was to be solved by the law of the Codes relating to mandate, and upon general principles regarding the nullity of contracts where no nullity had been enacted by law. It was not the case of a Job-Contractor's labourers. Without going the length of adopting the very strong expression of the counsel for the appellants that the job-contractor is a person "abhorred" by the law, it is easy to see from the tenor both of the Ordinance 7 of 1865 and the Regulations that it has been considered necessary for the sake of the Immigrants to impose pretty stringent rules upon the job-contractors before they can be allowed to have contracts of service passed before the Stipendiary Magistrate.

If those requirements have not been observed in the manner and mode set forth by the Regulations it is the duty of the Stipendiary Magistrate immediately upon his attention being called to any irregularity, to recall the contracts, and have the irregularities put to right by a new arrangement of consent of parties.

Here the job-contractor comes before him with a complaint and asks that his men be punished for neglect of duty and their defence—a defence be it marked to an action with penal consequences—is that the contracts are not good because the formalities required by the Regulations have not been observed or not validly observed—in short that they are not subject to the penalties of the Stipendiary law, because they have not been engaged under the formalities required by the Stipendiary law.

I think the plea of the labourers that the General Bond (which is an essential part of the transaction by which the job-contractor is enabled to hire labourers to work throughout a district) was bad from the want of signatures, ought to have been sustained, and I think the Bond is also bad from the contracts having been made at various dates subsequently. The Stipendiary Magistrate cannot hold the contracts to be good for the purpose of trying and punishing the men under the complaint, and then immediately afterwards cancel them,

as it is his duty to do, in consequence of these departures from the Regulations. Still less can he have the irregularities put to right, pending the case, so as to make contracts good which formerly were challengeable. When Masters enter complaints against their men they must be prepared for any defence on the part of the labourers which may tend to destroy the legal status of the Master, and Job-Contractors are especially open to this kind of defence from the regulations which have been established in regard to them, and the peculiar position in which they themselves stand to the Immigrants.

Holding these views it is unnecessary for me to go into the other grounds of appeal. The Judgment of the Stipendiary Magistrate appealed from is quashed and I remit the case to him to have these contracts recalled and renewed in conformity with the Regulations or cancelled, according to the wish of the Master and men. I am disposed to give costs against the respondent, but I must see a bill both for the costs before the Stipendiary Magistrate and in this Court before fixing the amount to be granted.

SUPREME COURT.

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In this case, the Court, using its discretionary power, allowed the creditors and official Assignees of an insolvent estate to enter, on behalf of the creditors, on action for fraud, against the Insolvent and his son, without giving previous security for payment of costs.

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Before

His Honor Sir C. FARQUHAR SHAND, KT., Chief Judge and

His Honor Mr. JUSTICE BESTEL, First Puisne Judge.

—

EDWARDS & ANOR,—Plaintiffs.

versus

FABRE & ANOR,—Defendants.

—

E. PELLEREAU,—Of Counsel for Plaintiffs.
C. RODESSE,—Attorney for same.

P. L. CHASTELLIER,—Of Counsel for Defen-
F. VICTOR,—Attorney for same. dants.

—

7th October 1874.

This was a motion made by the defendant Hippolyte Fabre that before being allowed to go on with the suit which they had raised against him and his father Arthur Fabre, the plaintiffs Edwards and Herchenroder, the creditors' and official assignees in the father's insolvency, should be ordered to find security for costs. The facts were the following.

Arthur Fabre the father had obtained a decree of discharge in a Cessio Bonorum on 17th August 1865, subject to the usual assignment of all his estate and effects to his creditors and this assignment he had executed, on 20th July of the same year.

In his balance sheet he admitted debts as due by him to his creditors of $252,432. No part of this sum has been paid. The present suit was raised in September of this year, by the assignees of his Insolvency. The declaration set forth that the Estate "Beau Vallon" which formerly belonged to the said Fabre senior and another party was sold by levy against them, on the 11th May 1865, and purchased by a mercantile firm in Port Louis.

That by working the said Estate a large portion of the mortgages have been paid off, and that the Estate itself, with several additional plots of ground forming altogether 1019 acres or thereabouts, was transferred by the said purchasers, on 12th February 1872 to the defendant Hippolyte Fabre, the son of the said Insolvent Arthur Fabre, for the sum of $ 175,000 with interest at 9 o/o. That the said defendant is a mere "prête-nom" for his partner the other defendant, and that the transfer and keeping of the Estate in the name of the son Hippolyte Fabre was a fraud connected by both defendants, with a view to avoid payment to the creditors of Arthur Fabre of their just debts. The assignees therefore concluded their Declaration by asking the Court to declare that the said Estate is the exclusive property of Arthur Fabre with costs against the defendants.

In this position of matters the present motion for security for costs is made.

JUDGMENT.

The general principle on which motions of this description are decided is clearly laid down in one of the authorities referred to in the discussion from the Bar. In Archbold's Practice Vol. 2 1349 it is said :—"It is entirely in the discretion of the Court or a "Judge, whether they will compel the plaintiff to give security for costs, and stay the

" proceedings in the meantime, till it be " given, and they may exercise such discre- " tionary power, at any time." The present case is not a little peculiar. The Assignees of an Insolvent father prosecute their debtor and his son, on a charge of fraud, to the prejudice of the creditors, whose interests the assignees are of course bound to protect. It is alleged that the defendants have connived together, to put a large and valuable Estate really belonging to the father and so available to his creditors, in the name of the son, to defeat the interests of the creditors. The defendant who stands vested in the estate has strongly and naturally pressed the hardship to which he is exposed, by being obliged to defend himself against assignees of an estate where there are no assets, without previous security for his costs, if they should ultimately be awarded in his favor. But this argument has something of a double edge. Assuming that there are no funds in the Insolvency, the assignees are exposed to the hardship of having not only to find money for their own costs, but if the contention of the other side were successful, they would be to a certain extent doubly weighted, having in addition to finding money for their own legal expenses to find security for the costs of their opponents. The case of Nalletamby in 1861, Piston, p. 185 of that year, is not in point here. There the assignees requdiated the suit raised by the insolvent, and the defendant called upon the latter to find security before he should be allowed to proceed with the litigation, and so the Court ordered. Here, the assignees are the plaintiffs and instead of their resolution that the case should not go on, so far as they are concerned we have the sanction of their opinion that the case is well founded and ought to be proceeded with. Looking at all the circumstances, we think that we shall best exercise our judicial discretion, by refusing, the motion at present, but reserving to the defendant, when the case is further matured, the right to renew his motion, if so advised. We need scarcely add that although the present motion is not granted the plaintiffs at the end of the day may if the Court should deem it proper—be found liable to pay the defendants costs.

No costs in the present motion.

SUPREME COURT.

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The Court decided that the facts of this case, as well as the wording of a certain deed under private signature emanating from both plaintiff and defendant, proved that defendant intended to make plaintiff his mandataire or agent but not his partner in the sale of certain cane tops and stems, and accordingly dismissed the plaintiffs' action.

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LOUSIER,—Plaintiff

versus

DAUBAN,—Defendant.

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Before

His Honor Sir C. FARQUHAR SHAND, Knight, Chief Judge, and

His Honor Mr. JUSTICE BESTEL, First Puisne Judge.

—

W. NEWTON,—Of Counsel for Plaintiff.
G. NEWTON,—Attorney for same.

E. PELLEREAU,—Of Counsel for Defendant.
E. LAURENT,—Attorney for same.

—

26th October 1874.

This was a demand in damages for breach of an agreement concerning the sale of the tops of New Caledonian canes. The defendant is the owner of the extensive sugar Estate named " Beau Vallon " in the District of Grand Port and the plaintiff is the brother of a neighbouring proprietor.

The agreement beetween the parties was as follows:

" Entre les soussignés Monsieur Dauban, " propriétaire de l'Etablissement " Beau Val- " lon " et Monsieur Henri Lousier, régisseur, " il a été convenu ce qui suit:

" Monsieur Dauban ayant à couper cette " année dix-huit cent soixante treize,—dix- " huit cent soixante quatorze, des cannes pro- " venant de la Nouvelle Caledonie, et dési- " rant tirer parti des têtes de cannes et le cas " échéant un meilleur parti des corps de ces " cannes qu'en les employant à faire du sucre, " offre à Monsieur Henri Lousier de s'occuper " à en chercher le placement le plus avanta- " geux en lui offrant comme compensation à " ses peines et soins une certaine portion du " résultat sur lequel il croit pouvoir compter

" lui-même. En conséquence, s'il s'agit, 1o. " de têtes de cannes vendues à tant le millier " rendues en ville ou à une gare quelconque, " le produit des ventes et livraisons effectuées, " déduction faite des frais encourus depuis le " barachois jusqu'au point d'arrivée, sera par- " tagé par moitié.

" 2o. S'il s'agit de cannes, ce produit sera " divisé par tiers : les deux tiers reviendront " à Monsieur Dauban, propriétaire, et l'autre " tiers à Monsieur Henri Lousier toujours " après avoir fait la déduction des frais du " Barachois au lieu de l'arrivée.

" Toute canne qui n'aura pas deux pieds " de long y compris la tête ; sera qualifiée " têtes.

" Toute canne dépassant deux pieds sera " l'équivalant de trois têtes, de telle sorte que " trois cent trente trois cannes équivaudront " à un millier de têtes, dont les parties fixent " entre elles le prix à vingt et une piastres " les milles cannes et sept piastres les mille " têtes. Les mandats que l'on pourra don- " ner à Monsieur Henri Lousier en paiement " des cannes ou des têtes qu'il aura vendues " seront faits à l'ordre de Monsieur Dauban, " propriétaire, et motivés, l'argent comptant " qu'il pourra recevoir sera versé entre les " mains de Monsieur Dauban propriétaire à " la charge par ce dernier de payer immédia- " tement à Monsieur Henri Lousier sur cha- " que mandat remi ou argent compté la part " qui lui reviendra d'après les conditions du " présent. Il est parfaitement entendu que " dans le cas ou Monsieur Henri Lousier " viendrait à vendre à vingt piastres les mille " cannes et six piastres les mille têtes les frais " de transport au chemin de fer seraient pour " le compte de Monsieur Henri Lousier com- " me aussi dans le cas ou Monsieur Henri " Lousier viendrait à vendre à un prix plus " élevé que vingt et une piastres les mille " cannes et sept piastres les mille têtes, la " différence de ce prix à celui obtenu serait " versé à Monsieur Henri Lousier qui en a " besoin pour ses agents.

" Fait double à Beau Vallon, Grand Port, " le vingt quatre Juin, mil huit cent soixante " treize."

Signés : { H. Lousier. A. Dauban.

The Plaintiff alleged that at the date of the agreement, the defendant had on his Estate eight or ten millions of canes from New Caledonia, which were the subject of the agreement, that the defendant had delivered to the plaintiff certain quantities of the said canes, which he had sold in terms of the agreement ; that between 15th October and 20th November of last year, the plaintiff had sold about 760,000 of cane tops of the above description at the advantageous terms of between 6 and 7 dollars the thousand tops and had promised to deliver the same to the purchasers ; that the defendant had refused to deliver the said cane tops thereby violating the agreement ; that the defendant had farther since the month of August 1873 disposed of said cane tops amounting to about 500,000 to various persons, without giving any notice to the plaintiff and without his intervention ; that no account had been given to the plaintiff of his share of the price of the said cane tops that farther, without notice to the plaintiff, the defendant had used about one million of the said canes for replanting his said Estate of Beau Vallon ; that the defendant's refusal to deliver cane tops had prevented plaintiff executing many demands for cane tops by different planters.

The plaintiff valued his loss at £3,000 for which amount he now sues the defendant in damages. The defendant pleaded 1o. that he only bound himself by the agreement to deliver cane stems and tops to the plaintiff, when he considered it advantageous for him to sell them through the plaintiff rather than manipulate or plant them or otherwise dispose of them. 2o. That in fact he never refused to deliver the canes, till the plaintiff by his own acts and negligence allowed about 892,000 cane tops cut down from 15th to 31st. October and put at his disposal to lie and rot on the ground, when he could have sold them, and farther allowed 50,000 cane tops which had been carried to the landing place at sea shore to lie and rot there. 3o. That the plaintiff has farther broken the agreement by not accounting for 159,000 cane tops delivered to him by defendant. 4o. That the defendant did deliver to friends by way of sale, barter, or gift, cane tops to the number of 276,000, or thereabout in terms of promises made before the date of the agreement and the whole was carried on with the knowledge of the plaintiff and farther he used 40,000 cane tops or thereby, to replant his own land, and the defendant alleged he had right to do so.

Evidence was led on both sides and the case was fully argued by counsel.

JUDGMENT.

In proceeding to dispose of the questions which have been raised between the parties in this case we must at the outset do our best to discover what their real meaning and intention were, when they subscribed the paper, called the agreement between them. It is not to be wondered at if the parties have now

to pay for the loose and unskilful way in which the paper is drawn and when disputes have arisen between them it is not surprising that they find but little in the vague and general terms of the so called agreement to help them clearly out of their difficulties On the one hand we have the plaintiff maintaining an elaborate argument to show that the paper really constituted a partnership or "société en participation" between him and the defendant as to all the canes of New Caledonian origin on the defendant's Estate "Beau Vallon" for the crop in question. According to this view of the case the plaintiff was to be suddenly elevated from the position of having nothing whatever to do with the Estate, to that of joint proprietor in the whole canes of the crop 1873-74 on the Estate amounting according to the report of the Expert Mr. Gondreville sent by the Court to visit the property to some 7,500,000. Into this alleged partnership the plaintiff admitedly was to bring nothing but his industry to be exercised in finding purchasers for the canes and cane tops, and he was to draw a share of the proceeds of the sale, viz: a half or a third, deducting certain expenses, as stated in the writing above referred to.

On the other hand, we have the defendant contending that the true meaning of the agreement was that the plaintiff in the whole affair was the mere nominee or agent of the defendant that he was entirely under the control of the latter who continued the sole owner of the canes in question, and could sell or retain or dispose of them as he pleased, without any right of question or interference on the part of the plaintiff. So completely divergent and inconsistent are the views of the parties as to the meaning of their own agreement.

It is certainly no easy task to spell out at once the meaning of the parties from the writing in question, but looking at the whole facts of the case generally, the relative position of parties, and the peculiar phraseology in some parts of the agreement itself, we are satisfied that the plaintiff has not been able to prove his case, as he was bound to do and show that his position in the affair was that of a partner or co-proprietor and not of a mandatory or agent employed to sell the canes fer a certain remuneration.

It is certainly very difficult to suppose that the defendant was to divest himself so to speak all at once of his power over the New Caledonian canes upon his own estate.

That he was to give up his right of cutting his own canes, when he chose, replanting his own fields when he pleased with his own cane tops and tie up his hands from making a present, a sale or exchange of some of the cane tops with his friends or neighbours.

It is not easy to believe that he intended to give up his ownership and subject himself to the control of a sort of partnership or joint adventure of which the plaintiff was to be the active member.

But not only do the general circumstances strongly favor the view concluded for by the defendant but many of the expressions in the document itself are opposed to the plaintiff's reading. Let us revert for a few minutes to the writing itself. We find on looking at it that the owner of the Estate "Beau Vallon" one of the largest in the Colony agrees with the plaintiff styled simply a manager, that the New Caledonian cane tops on Beau Vallon shall be turned to account by selling them and should an opportunity occur of making more of the stems of the same sort of canes they might be disposed of offers to the plaintiff to employ himself to look out for purchasers and to pay him a certain remuneration for his trouble. The drafts for payment given by the purchasers here to be handed to the plaintiff and were to be made out in the name of the defendant who is called "owner" not only where it is necessary to give him a designation, but throughout the whole writing the defendant is then to hand back to the plaintiff the share of the money falling to him according to the agreement. Keeping the whole circumstances in view, this does not look like a partnership of which the whole canes of New Caledonian origin on the defendant's Estate were the "*mise en société.*" But unless the plaintiff has proved that this was the relation between parties he cannot maintain this suit.

Taking then the case on the footing of the plaintiff being the mere paid mandatory or agent of the defendant in disposing of the canes the only other alternative, let us consider how far he is entitled to complain of the alleged grievances which he put forward. His complaints resolve themselves into this that the defendant after delivering certain cane tops to the plaintiff refused to deliver more cane tops when the plaintiff wished them and all this to his the plaintiff's loss and damage, that the defendant had sold or made presents of cane tops to his neighbours or friends and had used the other cane tops for planting his own land without giving any notice to the plaintiff and without his intervention.

Now if the plaintiff was the mere paid agent of the defendant the latter was quite entitled to refuse any farther delivery of canes and he could do with his canes what he liked,

subject of course to paying the plaintiff for his pains and trouble for what he did according to the scale mentioned in the agreement. We are satisfied that the plaintiff has failed to prove his case and accordingly the action must be dismissed. He admits that there is a considerable sum of money in his hands the produce of cane tops sold for which in any view he would have to give an account to the defendant if called upon to do so. But the latter has stated that he makes no demand of any kind whatever against the plaintiff.

Action dismissed. No costs.

SUPREME COURT.

Held by the Court that in virtue of Ord. 27 of 1871. *Art. 3—The District Magistrate had the right to inflict imprisonment in a case of contravention, upon an information exhibited by the Procureur General according to Art. 1 of the aforesaid Ord. No. 27 of* 1871.

MIRZA TAHAR,—Appellant

versus

THE QUEEN,—Respondent.

Before

His Honor Mr. JUSTICE BESTEL, First Puisne Judge.

W. NEWTON,—Of Counsel for Appellant.
G. NEWTON,—Attorney for same.

L. COX,—Counsel for Respondent.
J. BOUCHET,—Attorney for same.

November 1874.

Appeal from a conviction of District Magistrate.

The grievance on which the appellant chiefly rested for reversal of the judgment appealed from, was want of power to award imprisonment as a punishment for the offence of which she had been convicted for having knowingly and unlawfully had in her possession six pounds or thereabouts of gandia.

That the Procureur General had a right to reduce the penalty incurred, so as to render the District Court competent to adjudicate upon the offense charged, was not disputed. Ordinance 11 of 1869 far from taking away the powers of imprisonment merely forbids the awarding of a severe punishment *than imprisonment* for a period not exceeding 12 months or a fine not exceeding £50, in conformity to Article 120 of the District Magistrate's Ordinance (Criminal Side). The Magistrate, on reference to him made by the Procureur General of the charge preferred against the appellant for determination, having by Article 3 of that Ordinance jurisdiction to deal with the accusation preferred, heard the complaint, and on finding the appellant guilty of the offence charged, necessarily had to refer for the punishment to the Ordinance enacting the punishment of such offence viz: Art. 1 of Ord: 11 of 1871 which visits the offence with a fine of £100, reduced to £50 by the Procureur General, agreably to Article 5 of Ordinance 11 of 1869 or an imprisonment not exceeding one year plus the forfeiture and destruction of the gandia seized. (Art. 1 of Ord. 11 of 1871.) The Magistrate having elected imprisonment as the most effectual means of checking the offence complained of which appears to be of frequent occurrence.—I see no reason for differing from him on this head. I must and do hereby affirm the conviction appealed from and I accordingly dismiss this appeal with costs.

SUPREME COURT.

Held by the Court that, in this case, the words "compte vendu" written on the back of an accepted account did not make the endorser thereof liable to the taker in case of non-payment of the accepted account by the subscriber. Arts. 1693—1695 *C. C.*

Before

His Honor Sir C. F. SHAND, Knight, Chief Judge, and

His Honor Mr. Justice BESTEL, 1st Puisne Judge.

SANDAPA,—Plaintiff

versus

SELEMAN ELIAS,—Defendant.

L. Cox,—Of Counsel for Plaintiff.
J. Guibert,—Attorney for the same.

Chastellier,—Of Counsel for Defendant.
Ritter,—Attorney for the same.

—

26th *October* 1874.

In this case the plaintiffs seeks to recover from the defendant Seleman Elias the sum of $939 with interest at 12 o|o from the 16th of February, now last past the date of the protest with all costs of suit. The facts of the case are as follows: The late D. Pougnet had purchased from defendant in October 1873, 300 bags of rice for the net sum of $ 939.00. The bill of sale was approved and accepted by the said D. Pougnet and made payable by the latter on the 15th February 1874. This accepted account was endorsed by the defendant as alleged on the 21st October 1873 to the plaintiff who being unpaid by D. Pouguet by reason of the insolvency of the latter, now falls back on the defendant, whom he alleges to be liable in law to make good to him the unpaid amount of the said accepted account viz: the $ 939.00 now demanded, plus the interest at 12 o|o from the day of protest. Counsel on both sides were agreed that on an unqualified endorsement whether in full or in blank, the endorser is liable to the taker of the Bill, in case of non-payment of the bill at maturity by the drawer or accepter.

But said Chastellier for the defendant, the endorsement here is a qualified endorsement as shown, by the words "compte vendu" above the signature of defendant, which frees the defendant from all liability. Not so was the reply of Cox for the plaintiff because the words "compte vendu" is any thing but a clear expression of the intention of defendant of discharging himself from the liability necessarily attached to his indorsation. Had he intended to exonerate himself from all liability he would have undoubtedly made use of the unequivocal words "without guarantee on my part," or such other words which would have clearly conveyed to the mind of the taker of the bill or any other person to whom he might have transferred the same, that they were not to look to him the endorser for payment in case of non-payment by the acceptor of the amount endorsed by him.

Plaintiff and defendant were examined and cross examined as witnesses in the cause. Each of course as it might be naturally expected, gave a version of the transhetion most in accordance with the exigencies of his own case. Fortunately we have had the advantage of a disinterested witness who had been the go-between the parties in the cause, and we are bound to say that the weight of his evidence corroborated the defendant's construction of the transaction. But the weight of this evidence was critised by plaintiff, whose counsel stated that it was undeserving of any credit.

If so for the determination of this cause, we are driven to the necessity of laying aside the parole evidence adduced and of confining ourselves to the written evidence laid before us, and we must also ascertain the worth of this unusual indorsation.

Pougnet to use the expression of the plaintiff was shaky, on the one hand and on the other the defendant was on the eve of his departure for India and in full credit at that moment.

We may therefore safely assume that he was anxious to leave the Island free from all liability.

To this end he submitted first to a heavy discount of 10 o|o secondly he agreed to a commission of 2½ o|o and thirdly he consented to a brokerage of ½ o|o and this at a time when in full credit, but on the eve of leaving the colony.

The accepted account being payable to order, an endorsement was evidently required to enable the taker of the bill to act in his own name and on his own account, at the date of the maturity of the bill if unpaid or to give a valid discharge to the debtor Pougnet on payment. This indorsation was given but that it should not be extended beyond the object contemplated by him the defendant wrote the words "compte vendu" above his name, both of which were written in an Indian dialect unknown to the plaintiff, and he although ignorant of the meaning of those characters did not even get them translated at the time, but at once took up the account at the rate above mentioned, and paid the defendant the surplus of the amount of the bill. The "shaky" position of Pougnet soon degenerated into an insolvency; the accepted account remained unpaid, and the plaintiff now falls back on the defendant and asks him to refund to him the sum paid to him (the defendant), who denies his liability and rests his refusal to repay on the strength of the words "compte vendu."

Now what it is to be understood by those words?

We have here to deal with the sale of a negociable instrument transferable by delivery, by endorsement or by a deed of assignment. "Celui qui vend une créance ou autre droit

" incorporel " says Article 1693. C. C. " doit " en garantir *l'existence au temps* du trans- " port quoiqu'il soit fait sans garantie " and article 1694 of the same Code tells us that the vendor " ne répond de la *solvabilité du* " *débiteur* que lorsqu'il s'y est engagé....',

Have we here any undertaking by the defendant to pay the amount of the accepted account in default of Pougnet? No—and we are further told by Article 1695 C. C. that " lorsqu'il " (the vendor) " a promis la garan- " tie de la solvabilité du débiteur, cette pro- " messe ne s'entend que de la solvabilité ac- " tuelle." (that is to say at the time of the transfer) " et ne s'étend pas au temps à venir ; " si le cédant ne l'a expressément stipulé. " Surely in the words " compte vendu " of defendant, there is not the express stipulation required by law. If so how can the plaintiff succeed in the action.? On the one hand the words " compte vendu " do not necessarily imply any intention on the part of the defendant to render himself liable to the plaintiff on his not being paid by Pougnet, and on the other hand, the law requires that in order he should be liable, that such liability should be stipulated expressly, not by the assignee, but by the assignor.

In this state of things we can have but one course to follow, that is dismiss this action with costs.

SUPREME COURT.

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The Court decided that a broker who acted for a commercial man in bringing about a transaction of a commercial nature, did thereby a commercial act, and allowed parole evidence in order to prove certain promises made to the broker at the time of the transaction.

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BOULÉ,—Plaintiff

versus

HINNEKINDT,—Defendant.

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Before

His Honor SIR C. F. SHAND, Knight, Chief Judge.

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PELLEREAU,—Counsel for Plaintiff.
RODESSE,—Attorney for same.

NEWTON,—Counsel for Defendant.
GUIBERT,—Attorney for same.

—

17*th November* 1874.

In this case, the plaintiff a broker and exchange broker, asks payment of the sum of £100 sterling from the defendant, on the allegation that the defendant a merchant at Singapore and Mauritius, and represented here formerly by Maurice Eymond at present absent from the colony and now by J. A. Coutanceau merchant here is indebted to him in that sum. The ground of action is that Hinnekindt the defendant had passed a contract with Pierrot & Co., of Mauritius, for sale of timber; that there was a dispute between them, and two law suits in the Supreme Court as to the payment of the price, about $50000, and also as to the amount of damages claimed by Pierrot & Co., against the defendant amounting to upwards of $6000.

That on the 9th of February last, a fee of £100 was promised to the plaintiff by the agent of the defendant, if he would intervene in his capacity of broker and bring about a settlement of the affair; that the plaintiff succeeded in bringing parties to an understanding and in accomplishing the transaction between the parties, that the fee stipulated is now justly due to the plaintiff, and is only the per centage due to him by usage as a broker, in a matter concerning about $50,000. The defendant denied the employment and the whole of the plaintiff's statements.

The plaintiff produced the alleged settlement in writing prepared as he states by himself though in the hand writing of another broker, and subscribed by the parties. In support of his whole case he further asked to be allowed to adduce oral evidence.

The defendant disputed the competency of allowing parole testimony in such a case. The account he contended is much above the limit fixed by article 1341 of the code and the case is not really a commercial one.

No doubt the parties to the original sale were merchants, and the plaintiff is a broker but transactions as Paul Pont clearly shows: Petits contrats—V. II § 500 for the arrangement even of commercial matters, are in themselves of a civil, not commercial nature, and must be so dealt with in the matter of evidence.

" Lorsque Pierre et Paul, l'un et l'autre " marchands se rapprochent pour mettre fin " par une transaction au différend qui les di- " vise à l'occasion d'un marché conclu entre " eux, ils font un acte où rien absolument ne " revèle l'idée de spéculation ou de traffic " constitutif de l'acte de commerce.

" Il est vrai que la transaction ici a pour " but de régler des intérêts commerciaux, " mais cela ne fait pas qu'en elle même elle " soit, comme l'opération sur laquelle elle in- " tervient, un acte commercial, et en l'absen- " ce d'une disposition de la loi, qui la qualifie " telle, il est impossible d'y voir autre chose, " qu'un acte purement civil, auquel dès lors, " il convient d'appliquer en ce qui concerne " la preuve, le droit commum des matières " civiles. "

Counsel further cited the following authorities:

" 1o. Pardessus, vol. 1er No. 40.

" 2o. Traité de droit commercial par Bra- " vard—Veyrières, annoté par Ch. Deman- " geat, vol. II, page 193 last paragraph,— " page 194 first paragraph.

PELLEREAU—*contra.*

All the parties here are in commerce. The arrangement or transaction related to cases entirely commercial viz: disputes arising out of the sale of wood between two merchants, and a broker is one of the most prominent members of the commercial community.

So the whole thing was commercial. The authority of " Pardessus, " he himself admits in this passage is quite opposed to Massé's opinion.

We have besides the high authority of Massé & Verger on Zacharie who write in these terms vol. V § 767 note:

" Toutefois lorsque la transaction a pour " objet de prévenir ou de terminer une con- " testation commerciale, nous pensons que " constituant alors un acte essentiellement " commercial puisqu'elle a pour but de regler " les intérêts commerciaux en modifiant des " obligations commerciales, on doit lui appli- " quer en ce qui concerne sa preuve, les rè- " gles du droit commercial et non celles du " droit civil et que par conséquent elle peut " être prouvée par témoins. "—(Massé 611— " 332)

See also the following authorities.
1o. Arts. 74 & 632 of " Code de Commerce "
2o. " Pardessus—Droit Commercial, édition de Rozière, vol. I Nos. 41, 52.
3o. " Gouget & Merger Dictionnaire de droit commercial. Verbo Courtiers Nos. I & II.
4o. Ordinance 11 of 1836 Art. 1st.
5o. Art. 1985 & 1341 Code Civil.
6o. Dalloz verbo "mandats" Nos. 159, 164.
7o. Troplong, " mandats " No. 142.

JUDGMENT.

In this case the parties are commercial men and the subject of the suit arises out of the settlement of commercial accounts. It appears to me that in the conflict of legal authorities the weight is on the side of Zachariœ and his able french editors. I think their opinion is the sounder one and consequently that parole evidence should be allowed as to the alleged transaction here. And so the Court now orders. Costs reserved.

BANKRUPTCY COURT.

The Court held that a trader, or any other person liable to become a Bankrupt under Ord. No. 33 of 1853, who neglects or refuses to pay a debt, comes within the provisions of the aforesaid Ordinance, whether the debt be of a civil or commercial nature.

COMMERCIAL BANK,—Plaintiff

versus

GAUSSERAN,—Defendant.

Before

His Honor Mr. Commissioner GORRIE.

Hon. LECLÉZIO,—Of Counsel for Plaintiff
COLIN,—Attorney for the same.

E. PELLEREAU,—Of Counsel for Defendant.
RODESSE,—Attorney for the same.

December 1874.

The defendant in this case has been called upon by Rule of Court to admit or deny a debt said to be due by him to the plaintiff as a commencement of proceedings under Ord. 33 of 1853. The debt said to be due is a pro-

missory note for $5,000 granted by the defendant to his father Emile Gausseran and endorsed by the latter to the Bank.

The defendant objected 1st. that not being a trader he did not fall under the provisions of Ord. 33 of 1853 and 2ndly. that at all events the obligation he is called on to admit or deny is not in connection with trade, but was an obligation contracted, as the Bank well-knew to assist the working of the sugar Estate of his father a non-trader by virtue of the Ordinance.

After hearing witnesses the trading of the defendant as part owner of a Madagascar "bullocker" and also his separate trading in in bullocks was fully proved. The objection of the defendant was thus limited to the debt being of a civil and not of a commercial nature.

The case of Queland decided by Mr. Commissioner Arnaud in the Bankruptcy Court in 1868 was quoted by the defendant as well as various French authorities to shew that the law of that country drew a marked distinction between debts of a civil and commercial nature.

I have attentively considered the case of Queland which certainly favours in some degree the pretensions of the defendant, but I am unable to accept the general principles therein laid down as fully or in all respects correctly defining the position of the Law under Ord. 33 of 1853 applicable to this case.

That Ordinance established that certain persons were liable to be made bankrupts—and some were not—the distinction well known in english law at the time between traders and non traders.

There is no authority under the Ordinance for holding that in addition to the distinction of persons, there was also to be a sub-distinction which in many cases would be a very subtile distinction, a sub-distinction between the nature of the liabilities of such persons, while there are several clauses in treating of what are acts of bankruptcy which ignore any such distinction.

So far as this or the previous law 10 of 1838 may have modified the provisions of the Code, there can be no doubt it was so intended as an improvement of the Law.

In this case a trader for the purpose of assisting a non-trader has granted his promissory note, which has been endorsed to the Bank.

I have no doubt the Bank perfectly well knew why the obligation had been taken by L. E. Gausseran but he being a trader, and having granted this promissory note, has pledged his credit to its payment and may be proceeded against under Ordinance 33 of 1853 if the note remains unpaid.

I therefore order the defendant L. E. Gausseran to attend in the Court of Bankrupcy, on Monday next, the 7th instant at 10 of the clock in the forenoon, or on any such other day, and at such other time as Counsel can be heard to admit or deny the demand in conformity with the Rule of Court already served upon him.

SUPREME COURT.

The Court considered that in this case the fact of prescription invoked by defendant had been clearly proved and dismissed the plaintiff's action, but without costs.

COLONIAL SECRETARY,—Plaintiff

versus

HEWETSON,—Defendant.

Cox,—Actg. Subst. Pro. & Adv. General,—
Bouchet,—Attorney for same. [Plaintiff.
Hewetson,—For himself.

December 1874.

This is an action at the instance of the Colonial Government for recovery of a portion of land at Quartier Militaire in the district of Moka.

The Government contended that it was never conceded, whereas Hewetson pleads prescription if not under titles direct from the Crown, at least under titles followed by thirty years possession by himself or authors.

The evidence produced shows that by a blunder of the Government Surveyor when the concessions in this neighbourhood were being granted, the portion in question was described as the concession Foy de Brenchère, whereas that concession was in reality on the opposite side of the river. But for this mistake the land would have been included in the concession Ravenel now held by defendant.

We ordered the present possessors of the concession Foy de Brenchère to be called, but they have entered no appearance.

In this state of affairs, the land was apparently occupied by Ravenel and at least was comprised by him as his own in a sale by licitation before the competent Court, prosecuted by him after the death of his wife, and was embodied in the decree of adjudication in his favor following upon the sale on 13th August 1806.

The sales by licitation then as now were after public notices, when the attention of the officers of Government, as well as all other having an interest was called to what was in progress, and when any objection could have been made, if the ground was claimed by others.

Subsequent to this date there is an unbroken chain of titles now vesting the land in Hewetson, and we think the evidence also establishes that the possession, as a plot of ground of this nature was capable of, has been in Hewetson and his authors for the prescriptive period.

There is a clause in the conveyance of the land by Ravenel's heir Madame Vandermaesen to Hewetson's authors Marquet and Plansin of date 11th January 1838 to the following effect:

" Déclare Madame Vandermaesen, se dessaisir encore en faveur des acquéreurs susnommés de tous les droits de propriété qu'elle a ou peut avoir à exercer sur une portion de terrain habitation de la contenance de quarante trois arpents trois quarts située au dit Quartier Militaire et comprise dans le premier lot des biens adjugés au dit feu sieur son père, lors de la licitation dont il a été parlé plus haut.

" Mais attendu que Madame Vandermaesen n'a entre les mains aucun titre à l'appui de la propriété de ce terrain, qu'elle en ignore même les abornements et qu'il pourrait être reconnu plus tard que c'est par erreur qu'il a été compris dans la dite licitation et par suite des différentes sociétés qui ont existé entre le dit feu sieur son père et les sieurs Domal et Devienne lors de la dissolution desquelles sociétés le dit feu sieur de Ravenel a cédé à ses ex-co-associés plusieurs portions de terrain dans lesquelles celui dont il s'agit pourrait avoir été compris; la dite dame Vandermaesen n'entend en aucue façon garantir aux dits acquéreurs la propriété du dit terrain, mais elle déclare formellement renoncer en leur faveur à tous les droits de propriété qu'elle pourrait avoir à exercer non seulement sur le dit terrain mais encore sur d'autres terrains qui pourraient plus tard être reconnus lui appartenir en sa susdite qualité de unique héritière du dit feu sieur son père."

Cox for Government contended that in face of such a clause no one could possess the property "animo domini" which was as accessory to prescription as the mere lapse of time, but after giving our best attention to his arguments on this head, we are unable to adopt them. The clause was a saving one by Madame Vandermaesen, but as she herself had had 32 year's ownership of the land in question upon the decree of adjudication above alluded to, we do not think the clause is such as to destroy the legal effect of the possession already had of the land or to prevent her successors from getting the full benefit of these acquired rights. The prescriptive period has also elapsed since this conveyance was made.

We therefore sustain the second plea advanced by Hewetson and dismiss the case but looking at all the circumstances, without costs.

BAIL COURT.

The Court found the evidence adduced in this case so conflicting that it rejected the plaintiff's (now appellant) demand for damages and confirmed the judgment appealed from —with costs.

MARTIN,—Plaintiff

versus

PLANTERS DOCK COMPANY,—Defendant

Before

His Honor C. FARQUHAR SHAND, Knight, Chief Judge.

JENKINS,—Counsel for Plaintiff (Appellant)
ELIE,—Attorney for same.

NEWTON,—Of Counsel for Defendant (Resp)
SAUZIER,—Attorney for same.

November 1874.

Appeal from judgment of District Magistrate.

In this suit, the plaintiff sued the defendant for $215, as damages alleged to have been occasioned by a collision between a waggon or "chariot" the property of the defendant on which a large iron boiler was being carried and a cart or "charrette" loaded with syrup in barrels, on the high way at Moka on the 30th April last.

The plaintiff alleged that the collision was carried by the carelessness of the carters belonging to the defendant's company.

The defendants denied all the averments of the plaintiff—now the appellant.

Proof was led on both sides and the District Magistrate on the 13th August last pronounced judgment in favor of the defendants with costs.

The plaintiff reclaimed and Counsel were fully heard on both sides. The Court being of opinion that some important questions had not been put to the witnesses it was agreed that one of them a policeman, should be brought into Court, and interrogated as to the breadth of the road at the spot in question, the breadth of the waggon and cart, the nature of the alleged fracture of the axle-tree and wheel of the cart, and other leading particulars. This was done and the Court proceeded to judgment.

THE COURT.

The evidence in this case is very conflicting. In truth the witnesses for the plaintiff on some of the most important points in the case, say one thing, the witness for the defendants almost say directly the reverse. The plaintiff's witnesses depone that the waggon ran against the charrette, which was carefully drawn to its own proper side and made to stop to allow the heavy waggon to pass, while the defendant's witnesses swear that the waggon did not touch the cart at all, that the cause of the accident was that the mules of the cart ran off and dragged the charrette upon or against a long low heap of stones, built up alongside of the road for the purpose of making macadam or road metal whereby the axle-tree and the wheel next the stones were broken and the other damages complained of, were occasioned.

In this state of contradictory evidence it is necessary to test what the witnesses say, by other facts which have been brought to the surface in the controversy.

Now, there is one point very material which appears to be clearly established viz: that at the place in question the waggon with the boiler upon it, was close to its own proper side of the road.—In fact, it appears that the wheel was within six inches of the opposite ditch—Now what more could the driver of the waggon do to avoid a collision with the cart? It was proved that there was room enough on the road to pass without touching the cart and the waggon was close, almost dangerously close to its proper side. All this goes very strongly to show that the defendants and their servants were not in fault. In any view it is clear that the plaintiffs have not proved their case as they were bound to do, and the judgment below must therefore be affirmed.

Appeal dismissed with costs.

MAURITIUS—SUPREME COURT.

The Court in this case ordered the Master of the Supreme Court to stay proceedings in a licitation of a plot of ground belonging to the Petitioner and to several other people because it was for the interest of the majority of the heirs to have the plot of ground intact for a certain time at least, and appointed the Curator of Vacant Estates to be provisional administrator or curator of the person and estate of one of the heirs whose interdiction was then being sought.

Before

His Honor Mr. JUSTICE BESTEL, First Puisne Judge.

His Honor Mr. Juslice J. GORRIE, Second Puisne Judge.

Ex parte:

JEAN PIERRE ISNARD.

Petition for the interdiction of Heloïse Isnard

PELLEREAU,— Of Counsel for Petitioner.

8th December 1874.

In this case which came on for hearing on the merits of the Interdiction on the 11th of August last, we were struck by certain strong expressions made use of by the alleged lunatic in her examination as to her determi-

nation not to sell her property. We enquired whether any proceedings were in progress for this purpose and learned that a licitation was actually in dependance before the Master's Court. This fact had not been communicated to the Ministère Public.

Having taken time to consider our judgment a petition was brought to us on the 27th October by Emilien Isnard, the plaintiff in the Licitation proceedings, stating that he and his brothers and aunts were destitute of the means of existence, and praying for a speedy termination of the proceedings in the Interdiction, in order that they might obtain payment of certain overdue rent for the two pieces of ground belonging to the family from Mr. Raffray.

Emilien Isnard has only a very small interest in the property and he stated that he had no desire to have the land sold or the price divided, especially if the proceedings should be in any way expensive. As it is clearly for the interest of the party who is sought to be interdicted (Héloïse Isnard) that the property should not be sold as long at least as the lease to Raffray shall continue i. e. to 1877 we order the proceedings for licitation (which we bring up to this Court for that purpose) and which have been stayed by the Master until the proceedings for interdiction were brought to a close, to be further stayed until the Court shall give order therein, and we further direct the rents resting owing under the lease by Emilien Raffray, to be paid forthwith into the hands of the Master of the Supreme Court, to be by him distributed without cost to the heirs according to their several proportion as shown by the proceedings for licitation and thereafter the rent to be paid by Raffray according to the terms of the lease to the provisional administration hereafter named. Moreover under Art. 497 of the Code and the general powers of this Court we appoint James Brown acting Curator of Vacant Estates to be provisional administrator or curator of the person and estate of the said Héloïse Isnard and sist proceedings in the action for interdiction in the meantime, the Court being of opinion that the interests of the person sought to be interdicted as well as the heirs will be most effectually protected by retaining the property intact at least until the termination of the lease to Raffray; the outlays of the attorney in the matters of the interdiction and the licitation to be paid by the Master from the arrears of rent, and the rent to become due to be distributed by the provisional administrator to the parties having right thereto according to their several interests.

SUPREME COURT.

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In this case the Court refused to extend the reduction of legacies to those legacies which were made by "preciput et hors part" but ordered the reduction of a legacy of a plot of ground to which no such words were added. Art. 927 C. C.

The Court further strongly condemned, as derogatory to the legal profession, the practice of certain attornies who assign bills of costs, due to them and payable by privilege, to third parties for the purpose of raising funds upon them.

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VINCENT GEORGES,—Plaintiff,

versus

EUGÈNE CANTIN,—Defendant.

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Before

His Honor Mr. Justice Bestel, First Puisne Judge, and

His Honor Mr. Justice Gorrie, Second Puisne Judge.

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P. L. Chastellier,—Of Counsel for Plaintiff.
F. Victor,—Attorney for same.

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December 1874.

In this case the amount of the succession is not sufficient to pay in full the various legacies left by the deceased and questions have accordingly arisen as to the particular legacies which are to be subject to dimunition.

We regret to say that these questions have arisen chiefly if not solely through the amount of costs which have been heaped upon the succession first, by the apparently needless number of attorneys employed and secondly by one of the attorneys taking advantage of his position and appearing as a defendant in various nominal suits for the delivery of the legacies solely for the purpose of increasing costs.

We would have been in a better position to deal with these questions had they been brought before us at the proper time, that is, at the time the nominal suits came up for

judgment and before we had allowed these costs as cost of succession.

But as matters stand we do not see our way to interfere with the decision already come to and unobjected to, that these costs and the amount of them as taxed by the Master shall be costs of succession.

On the point raised by Rouillard against the collocation of Hugues in right of Tessier as to the excessive amount of the costs of the latter on the sale of a property for $ 3000, these with interest amounting to $1900, the same remarks apply that it is too late for us to go back on matters which occurred in 1867 and to which his client herself took no objection at the time. The legal costs at that time in connection with small properties were excessive, they are still frequently too large and the Court could sometimes do much to mitigate them if the bills were brought before us, which is frequently not done.

We must however sustain the collocation of Hugues, but we must add that we look upon the system as derogatory to the profession, where bills of costs are assigned to others by the Attorneys to whom they are due, for the purpose of raising funds upon their privilege for costs, but in this case it is unnecessary to say more as to the Attorney who has assigned, as he has left the colony.

On the other point raised by Rouillard that the reduction of the legacies should in this case have been extended to the legacies made by "*preciput et hors part*" we are of opinion that the use of those words are sufficiently expressive and indicative of a preference on the part of the testatrix in favor of the parties to whose legacies those words are affixed, to warrant the Notary having acted as he has done and we accordingly support the view, the Notary has taken of this point. But we concur with Rouillard in adjudging that the legacy of the piece of land given to Léonce Heloïse to which no such words are added is susceptible of reduction and this on the strength of the text of Article 927 C. C. (See also Marcadé's Comments on this article.)

And on the authority of the last part of Art. 927 viz: " le legs qui en sera l'objet (de " préférence) ne sera réduite qu'autant que " la valeur des autres ne remplirait pas la " réserve légale." Should the necessity arise after the amendments for the reduction of those legacies to which are attached the clauses of "*preciput et hors part*" the Notary will of course have to reduce those legacies as he has done with those to which no preference has been expressed.

The homologation is accordingly stayed until the amendments or rectification ordered shall have been made by the Notary. Costs meantime reserved.

MEMORANDUM OF PRACTICE.

In all cases of sequestration of Estates, the party applying for the same, shall give at least 3 clear days notice to the Protector of Immigrants, who shall be asked in each case, to enquire and ascertain :

1o. What is the amount of wages due and for what period.

2o. If the rations are regularly distributed.

3o. The Protector is farther to inform the Court of any other matter which he may deem material with reference to application.

C. Farquhar Shand, Chief Judge.
N. G. Bestel, First Puisne Judge.
John Gorrie, Second Puisne Judge.

Read in Court on 11th December 1874.

Isnard,
Chief Clerk.

JUDGMENTS OF THE SUPREME AND OTHER COURTS

OF

MAURITIUS

EDITED

BY H. LE MIÈRE, BARRISTER-AT-LAW.

1875.

SUPREME COURT.

In this case plaintiff claimed damages from a notary public for having drawn up deeds by which mortgages were given by a wife to her husband's creditors on an immoveable property which had been apparently sold to her—but was in reality the property of her husband, on which the husband's children by a first marriage would have a legal mortgage in the first rank if the property had been in his name,—the object of the deeds of mortgage and of the deed putting the property in the wife's name being to defeat the children's hypothec, and the notary having had notice of this fraudulent object both from several deeds which he had signed and, through his clerk, from an acquittance and a contre-lettre which the clerk had drawn up while discharging his duties as clerk in preparing the deeds of mortgage, the drafting of which had been entrusted to him by the notary. The plaintiff contended that the scheme was fraudulent and that the notary had participated in it and was therefore liable in damages.

The court ruled that the notary was neither guilty of personal fraud nor responsible for the knowledge of his clerk in the matter, he having expressly prohibited the drawing up of contre-lettres in his office; Mr. Justice Gorrie dissenting, and holding that the notary had drawn up the deeds of mortgage that caused the damage, knowing the fraudulent object of defeating the children's legal mortgage both from deeds which he had previously drawn up and being responsible for the knowledge which his clerk to whom he had entrusted the business concerning the mortgage deeds had of the private acquitance and of the contre-lettre.

RAMPANT,—Plaintiff.

versus

PELTE,—Defendant.

Before

THE FULL BENCH.

E. PELLEREAU,—Of Counsel for Plaintiff.
J. ACKROYD,—Attorney for the same.

W. NEWTON,—Of Counsel for Defendant.
J. GUIBERT,—Attorney for the same.

Judgment of Mr. Justice Gorrie.

15*th January* 1875.

This is an action against a Notary public for damages alleged to have been caused to the plaintiffs by a fraudulent exercise of the functions of the notarial office.—The allegations material to the issue upon which the action is founded are generally these 1o. That a sum of $ 16,660.22 was due by Lambert Fabius Gautier the father of Madame Rampant to his minor children in his capacity as legal guardian of the said children; 2o. That while this sum was truely owing but before account of guardianship had been made up or any balance struck, the said Lambert Fabius Gautier became owner of a portion of land called Satory of the extent of 342 acres at Curepipe which he purchased for the sum of $ 12,985.25 from Madame de Terrasson, the mother of Madame Gautier and which piece of ground thereupon became subject to

the legal mortgage of Mrs Gautier's two children—3o. That in order to defeat the said legal mortgage the defendant drew out the notarial act of sale in favour of Madame Gautier, Mr. Gautier's second wife, the step mother of the children, at the same time having a contre-lettre by Madame Gautier signed, admitting that although the title was in her name, the property really belonged to her husband. 4o. In the knowledge of these facts and especially of the contre-lettre; that the notary public drew up other notarial acts constituting mortgages by Madame Gautier on the said piece of ground in favour of Mr. Gautier's creditors, other than the children, by means of which the greater part of the property was ultimately seized and sold by the said creditors, and Gautier having no other property, the said Mme. Rampant has not been paid the sum admitted to be due to her by the account of guardianship except to the extent of $ 3,550 leaving a balance of $ 13,110.22 unpaid.

The pleas of the defendant are a denial of the fraud and an assertion that he believed the sale to Mme. Gautier to be a *bona fide* sale, that he gave no instructions to any one to draw the contre-lettre, and that he was ignorant of its existence at the time he drew up the mortgages by Mme. Gautier, and until the end of 1872 or begining of 1873 when Rampant the husband, mentioned to him that a contre-lettre had been executed.

Mr. Pelte the defendant, Mr. Leonce Boullé the clerk who wrote the contre-lettre, and various other witnesses were examined, called by Plaintiff or Defendant; and the notarial acts and all the documents connected with the rather complicated transaction in dispute were put in and the parties fully heard.—From the oral evidence and the documents we are enabled to follow the history of the case which is as follows.

By notarial act passed before Mr. Pelte, of date 14th August 1865, the said Lambert Fabius Gautier and A. M. Marquet obliged themselves to pay to Emmanuel Clement two sums of $10,458 and $ 351, and in guarantee Gautier assigned a sum of $ 5,000 which he had paid with subrogation on 7th April 1865 to the heirs Gallet as part of the price due by Terrasson the husband for the said piece of ground called *Satory*.

From the account of guardianship rendered by Mr. Gautier to his daughter conform to Notarial act passed before Mr. Pelte on 27th December 1867 it will be found that a sum of $ 7,000 belonging to his minor children was paid to him on the 5th of April 1865 of which there can be little doubt this sum of $ 5,000 advanced two days afterwards formed a portion. In the same notarial act of 14th August 1865 in favour of Clement the following words are found: " Monsieur Gautier déclare que la " dame son épouse a l'intention d'acquérir de " Madame Veuve de Terasson une portion de " terrain de cent arpents dépendant de l'ha- " bitation *Satory* située au quartier des " Plaines Wilhems lieu dit Curepipe et que " la dite dame son épouse sans s'engager per- " sonnellement conférera au dit sieur Cle- " ment en garantie de la présente obligation " une hypothèque en première ligne sur la " dite portion de terrain jusqu'à concurrence " du montant de la présente obligation."

It is clear from the tenor of this notarial deed that Mr. Gautier was then in embarrassed circumstances, and in order to obtain delay from his creditor Clement he was obliged to give him various guarantees in security of the obligations then undertaken and amongst others a promise that his wife who was about to acquire a portion of land would give a mortgage in first line upon it.

By notorial act of sale dated the 19th September 1865 passed before Mr. Pelte and his colleague, Madame de Terrasson conveyed to her daughter Madame Gautier under reservation of 100 acres conveyed or about to be conveyed to Mr Wiehé and 100 acres reserved to herself—the land at Curepipe over which Mr. Gautier had the privileged claim of $5,000 which he had provisionally ceaded to Clement and over which also he had an other privileged claim of $ 7,985.28 in virtue of a judgment of the Supreme Court of 21st April 1865 against the widow and heirs Terrasson for sums said to have been advanced and paid by Gautier for Terrasson the husband then deceased but there is no indication whether the second amount belonged to the estate of the children by the first marriage.

The price of the portion of *Satory* thus conveyed to Madame Gautier was $ 12,985.28½ being the amount of the two claims of Gautier over the land, which Madame Gautier undertook to pay to her husband " en l'acquit de la venderesse " the amount is expressly stated to be total of the claims of Gautier upon the terrain *Satory*.

Madame Gautier was married under the regime of separation of goods, but she had no fortune, as is shown by the copy contract of marriage of 22nd October 1857, and the evidence of Mr. Pelte who stated " to my knowledge Mrs. Gautier had no fortune."

After the notarial Act of sale of 19th September 1865 was passed, Madame Gautier on 19th October 1865 by Notarial Act passed

before Mr. Pelte granted a mortgage to secure whatever balance might be due to one Letellier by Gautier the husband and Marquet on account of the property *Ravin*. On 31st October 1865 Madame Gautier by Notarial Act passed before Mr. Pelte consented to a mortgage in favour of Clement over 100 acres of the said land for the sums already mentioned namely $ 10,458 and $ 357. Mr. Letellier to whom the first obligation was granted was a person in Clement's employment.

On 29th December 1865 by Notarial act passed before Mr. Pelte, Madame Gautier granted a mortgage in favour of the same Letellier for $ 4000 over 100 acres of the said land at Curepipe, and on December 30th 1865, the day after this Notarial Act, another notarial act was passed before Mr. Pelte in which the true liability of Gautier and Marquet to Letellier was stated to be $ 3013.81 and Madame Gautier bound herself personally to pay the said sum. Why a mortgage for the sum of $ 4,000 should be taken on one day and the next a notarial act should be passed to show that the debt due was only $ 3,013.81 it is hard to understand.

After the first mortgage was granted to Letellier of 19th October and of same date as the Mortgage granted to Clement on 31st October 1865, Mr. Gautier the husband granted a discharge to his wife of the sum of $ 12,985.28 and this discharge was made a notarial deposit with Mr. Pelte by his act of 2nd December 1865.

The contre lettre is not dated by month or day of the month these being left blank but the year is entered as 1865.—Its tenor is to following effect:

" Je soussignée Marie Eugenie de Terras-
" son épouse majeure séparée quant aux biens
" de M. Lambert Fabius Gautier aussi sous-
" signé qui m'autorise, déclare par ces pré-
" sentes que ce n'est que pour faciliter les
" affaires de Monsieur Gautier mon mari que
" jai acquis sous mon nom de Mlle. Antoinet-
" te Jeanne Marie Françoise de Terrasson,
" ma mère, veuve de M. Jean Pierre Laurent
" Washington de Terrasson, une portion de
" terrain de la contenance d'environ trois
" cents quarante deux arpents en superficie
" située au quartier des Plaines Wilhems lieu
" de Curepipe suivant contrat de Me. Pelte
" notaire du,.....1865.

" Mais que la vérité est que je n'ai acquis
" cette portion de terrain que pour le compte
" du dit sieur Gautier mon mari qui en est
" seul propriétaire. En conséquence je m'em-
" gage à la première demande du dit sieur
" Gautier de passer vente de cette portion de
" terre soit a lui-même dit sieur Gautier, soit
" à tous autres qu'il m'indiquera moyennant
" les prix et charges dont il conviendra.

" Fait double au Port Louis, le.....
" mil huit cent soixante cinq (signé) approuvé
" l'écriture F. Gautier —approuvé l'écriture E.
" Gautier née de T·"

The contre lettre is in the hand writing of Mr. Léonce Boullé then a clerk in Mr. Pelte's office who also wrote the discharge by Gautier to his wife and who was concerned in preparing the act of Mortgage to Clement and Letellier.

Before considering whether the defendant Pelte has incurred any liability to the plaintiff in consequence of the series of notarial acts and deeds above mentioned I shall proceed to enquire into the nature of the transaction itself because if that is sound, honest, and legal there can be no responsibility incurred either by the defendant Pelte or the guardian Gautier.

What was the meaning and effect then of the sale by Madame de Terrasson to Madame Gautier? Mr. Pelte in his evidence deposed that the deed was drawn up at the request of the parties and that it was Madame de Terrasson an old lady of 70 or 75 years of age who had just had an attack of paralysis and who felt she had not long to live who told him that by selling to her daughter in the way in which it was done she Madame Gautier could pay off the debt affecting her husband, with a part of it and have the rest clear for herself. At a later period of his evidence Mr. Pelte stated that he was not sure whether it was his first clerk Theodore Sauzier who had got the instructions from Madame de Terraston or himself, but that at all events when all the parties were present at the signing of the act of sale Madame de Terrasson and Mr. & Mrs. Gautier, he found the deed expressed the wish of the parties. The examination of Mr. Sauzier taken "de bene esse" before his departure for Europe gives no information on the point.

We have seen that Madame de Terrasson had after the death of her husband purchased the lands of "Satory" at the bar for a sum of $ 20,500 on a licitation at her instance against the heirs Terrasson on the 8th June 1865 and of this price she owed $6,718.50 to the Honorable Christian Wiehe and $12,985. 28½ to Mr Gautier as established by a partition made before the same notary Pelte on 4th September 1865.

The sum due to Mr. Wiehe was paid to him by selling or handing over to him one

hundred acres of the land for the amount of his claim. The notarial act was passed before Mr. Pelte on 19th September 1865 the very same day as the sale to Madame Gautier—At first sight the sale to Madame Gautier for the exact sum of Gautier's claims would seem to be a payment to Gautier in the same manner as to Mr. Wiehé, but Mr. Pelte says it was something very different. He asserts in so many words that Madame de Terrasson was in a position to dispose of her land in whatever way she pleased and that she wished so to dispose of the portion sold to Madame Gautier as to enable her daughter to pay off her husband's two creditors Letellier and Clement and then that her daughter should have a balance of the land for herself.—Is this position of the notary consistent with the nature of the transaction as proved by the documents themselves?

The first indication which we have from these documents of the true nature of the transaction is the statement by Gautier in the deed of 14th August that it was the intention of Madame Gautier to purchase a piece of ground at Curepipe, and that she would give Clement a first mortgage upon it.—This was a month before the parties could have come to Mr. Pelte, or Mr. Sauzier about the act of sale and the statement then made in a notarial deed before Mr. Pelte himself is at least not in harmony with the alleged explanations of Madame de Terrasson at the time of the drawing up of the deed of sale. Moreover, as we have seen, Madame de Terrasson had only purchased the property about two months before, on a licitation at her own instance against the heirs of her late husband, at a nominal price equal to the united debts of Wiehé and Gautier and the costs, but, if these debts could be paid off and still leave a portion of the property, it is scarcely reasonable to suppose that one of the children only of Mr. de Terrasson was to benefit by this excess. Or, if it was intended by all interested to favour Madame Gautier, the natural course would have been for her to have purchased under the licitation.

Again, if the $ 12,985.28½ due to Gautier could have purchased a larger amount of land than the 200 acres mortgaged to Clement and Letellier, the balance of land conveyed clearly belonged to Gautier, and could in no just sense be regarded as a donation by Madame de Terrasson for the benefit of her daughter.

On the theory that Madame de Terrasson wished to give an individual child a donation or benefit in some way, I cannot understand how Mr. Pelte should have recommended the mode of carrying out that intention which has been adopted.—Having the disposal of her own land, as the notary explained, why did she not convey to Gautier as she did to Wiehe a portion equivalent to his claim, and then convey to Madame Gautier directly any other portion which she might desire to give? By the mode adopted Madame Gautier had immediately to grant mortgages, to become liable for interest and even for the principal sum, in at least one deed, and expose herself to proceedings in ejectment which actually took place. The plan hit upon is sufficiently intelligible if the object was to escape conveying the land to Gautier, in order to keep off the legal privilege of the children of the first marriage.

Moreover the deeds themselves and notably the deeds of sale tell us that in place of Madame de Terrasson, conveying a portion of her daughter out of a larger portion of land reserved to herself, she in fact reserved to herself 100 acres, and conveyed the whole of the remainder. The expression in the deed is, " la portion de terrain presentement vendue " appartient à Madame Veuve de Terrasson " comme faisant le surplus (*deduction faite* " *des cent arpents par elle reservés*, et de " cent arpents qu'elle a dessin de vendre à " Mr. Wiehé) d'un terrain etc., etc." Unless there had been the necessity for paying the debt due to Gautier, is it possible to believe that Madame de Terrasson would have conveyed to her married daughter, one of the several children, a large portion of the property than she retained to herself? She made no explanation to the notary which could have led him to believe this. Had he been informed of it, as the transaction was so unusual he doubtless would have remembered it, and indeed the fact of the old lady of 70 or 75, on the brink of the grave, as we were told, coming to the Notary with the daughter and son-in-law whom she proposed largely to benefit, without apparent cause, at the expense of the other children would have been so suspicious that Mr. Pelte would doubtless in the exercise of his duty, have been very careful to make sure that the old lady was not acting under improper influence.

Here is another deed which is not consistent with the theory thus advanced by the Notary in his evidence, a conveyance made later on by Madame Gautier of a portion of the land to the plaintiff in this action and which was also prepared in the bureau of Mr. Pelte. This deed is dated 16th March 1868, and conveys 71 acres or the half of 142 acres which were left in name of Madame Gautier, after Letellier and Clement had entered into possession of the portions mortgaged to them, and bears to have been in consideration of the price of $ 3,550 which Madame Gautier acknowledged to have received from Monsieur

Rampant the Plaintiff. Now the price was not paid by Mr. Rampant to Madame Gautier, but on the same day Madame Rampant by notarial act before Mr. Pelte discharged Mr. Gautier of the sum of $ 3,550 of the amount which he owed under the Guardianship.

If there had been any doubt before, to whom the land belonged, this fact ought to have convinced Mr. Pelte that there was more in all the tortuous conveyancing we have gone through, than the carrying out of the benevolent wishes of Madame de Terrasson.

It is to be remarked that even in this conveyance the statement of the way in which the price was paid is not consistent with fact, although, if there were nothing unusual or remarkable about the mode in which the price was paid, there seemed to be no reason why it should not have been correctly and truthfully stated.

The Notary is not sure whether the statement of Madame de Terrasson which he quotes as the explanation of the conveyance to Madame Gautier was made to himself or to Mr. Sauzier his first Clerk.

I am quite sure that it could not have been made to himself at all events that Mr. Pelte would not have believed it if it had, because a Notary accustomed to the practise of conveyancing must have understood at a glance the whole nature of the proceeding if he had personnally looked into it. If any such representations were made to him it must have been by a person having an interest to mislead the Notary, and to divert his attention from the real nature of the transaction.

The fact is that in this case the Notary was practically lending his name to his clerk and had not himself paid that personal attention to what was going on which is so desirable for a public officer in his position. From the evidence both of Mr. Pelte and Mr. Boullé the clerk, it is clear that Boullé, a person who had been many years in the office, had been busying himself with Mr. Pelte's consent, with the affairs of Letellier who was his cousin, Clement in whose employment Letellier was, and Gautier, and that he, Boullé, had the chief share in arranging these transactions, and in completing them by the necessary deeds. Now Boullé did not believe that the transaction was a gift or benefit from Madame de Terrasson to her daughter. If he ever had been likely to be imposed upon by such a fiction his mind would have been disabused when Gautier requested him to write the Contre Lettre.

The Contre Lettre is not dated, that is the year only is filled in while the day of the month and the month itself are left blank. The Plaintiffs argue that the Contre Lettre must have been prepared at the same time as the Deed of sale but before the Deed of sale had been actually signed, the day and the month not being filled in until the actual signature, and that the signature of the Contre Lettre took place at the same time as the deed of sale. From the nature of the transaction and the evidence I think this to be most probable, and that consequently the Deeds of Mortgage made subsequent to the date of the deed of sale, were passed at a time when Boullé was fully aware of the existence of the Contre Lettre.

I have no doubt as to the nature of this transaction so far as Gautier is concerned. Had he taken the conveyance in his own name the legal privilege of his children would at once have come in by the operation of the law, and it would have been impossible for him to have used the land as he did for the purpose of satisfying the demands of other creditors who for the moment were more pressing.

It may well be asked what interest had Mr. Gautier to give a preference to his creditors at the expense of his own children, and above all what interest had Mr. Boullé to lend himself to a scheme of this kind? The interest of Gautier to settle with the creditors who were pressing him at the moment was a very strong one.

He had indeed by one of the acts already mentioned obtained the postponement of the principal of his debt for a considerable time, but as was explained at the bar by the counsel for the defendant he could not pay the interest, and fresh arrangements were necessary.

The money belonging to his children was in his hands as Guardian but he did not require to give an account until his children were emancipated, and in point of fact the account was only given on the marriage of the plaintiff on the 5th day of December 1867 and when Gautier admitted to have received $ 16.660 of the children's funds, but was utterly unable to pay any portion of it. The law of the Code, it is scarcely necessary to add, gives a legal hypothec in favor of the minors independently of any formal inscription upon the real property of the guardian, and that this would have taken immediate effect had the conveyance been made to Gautier direct.

It is not proved that Mr. Boullé, the Clerk,

had any personal interest in the matter further than that he was a relative of Letellier, and that Letellier was in the employment of Clément the largest creditor. That fact, however, complicated the position of affairs considerably. A Notary is different from an attorney in this respect that he draws up the deeds at the request of both or all the parties to it. He is thus acting for more clients than one, and as the notary has alone the privilege of making authentic acts he naturally becomes the legal adviser of the parties in regard to the matters dealt with by those acts. This privilege and the delicacy of his position in acting for more than one client, ought to make him all the more careful that he does not attempt to act for parties having dissimilar or opposing interests. But here Mr. Pelte through his clerk Mr. Boullé was acting not merely for Madame de Terrasson and Mr. and Mrs Gautier the parties to the deed of sale, but also for Clement and Letellier the creditors of Gautier, whose interests were certainly different from those of the seller and the buyer.

The interests of Clement and Letellier were above all different from the interests of the minor children of Gautier that is their interests were different from that of Gautier in his capacity of guardian for his minor children. Mr. Pelte in his evidence stated that at the time these deeds were being passed his attention was not drawn to the fact of the children being in existence, or their position in regard to their guardian, that it was only afterwards, in the month of November when the subguardian took an inscription on behalf of the minors against the property of Gautier, that his attention was particularly drawn to the guardian-ship. Even then at the second mortgage to Letellier was not passed, and the forcible ejectment had not followed on the mortgage to Clément there was time for effective interference, but Mr. Pelte did nothing although the fact that the children had claims against the father or their guardian must have shed a new light upon this series of deeds for any one who was previously not aware of so important a circumstance.

That Mr. Pelte's attention was not at once arisen to the position of Gautier as regards his children only shows the want of care bestowed upon the transaction. Mr. Pelte had been notary in more than one estate where the children Gautier were beneficiaries, and as the legal mortgages under the Code create considerable anxiety in the conduct of business, and are never absent from the minds of careful conveyancers, it its scarcely possible to believe that if Mr. Pelte had paid any attention to the transaction the effect of the conveyance to Madame Gautier upon the legal rights of Gautier's children would not have occurred to him, so as to cause enquiries and explanations which would have elucidated what was in progress.

I am satisfied however that Boullé did know from the begining of the position of Gautier with regard to his children, and that acting for Clement and Letellier who were naturally anxious to get a preference over them, he advised with Gautier and arranged the series of deeds before us with the view of giving that preference. The difficulty in their way was that Gautier's only funds or to speak more exactly the only available funds in his name, for there can be little doubt they really belonged to the children, were invested in the portion of ground at Curepipe which belonged to de Terrasson the father of his second wife. De Terrasson had died and it was necessary before the arrangements to satisfy Clement and Letellier could be carried out that his affairs should be put in shape, which was done by means of friendly licitation under which Madame de Terrasson bought the land, and a petition was drawn up by Mr. Pelte. The adjudication on the licitation was of dates 8th and 12th June and the partition 4th September 1865. This partition shows that the debts on the property equalled the value for which it had just been bought. The only possibility for Madame de Terrasson freeing any portion of the land was to get the creditors to accept somewhat less than the whole in payment of their claim. Mr Wiehé accepted 100 acres, she reserved 100 acres for herself, and then I am satisfied from the whole tenor of the evidence that the balance of the land was really handed over to Gautier in satisfaction of his claim, and that the deed would have been in his favor directly had it not been for the arrangement made by Boullé acting as Mr. Pelte's clerk and in Mr. Pelte's name, to give Clement and Letellier a preference over Gautier's children. The conclusions of the declaration charged Pelte with knowledge of the contre-lettre, thus involving knowledge that the land did not belong to Madame Gautier at the time when the mortgages which led to the ultimate loss of a portion of the property were drawn up. As to the contre-lettre Mr. Pelte has most positively and in the most solemn manner denied all knowledge of it, and he moreover expresses a hearty disapproval of the système of contre-lettres, and said he never permitted them to be drawn in his office. We were the more gratified to hear these views from a notary holding the influential position of Mr. Pelte, that we have had cause to doubt whether the same just views were universal in the profession, and while accepting to the fullest extent Mr. Pelte's statement that he did not permit contre-lettres to be drawn in

his office, I am not disposed to saddle Boullé with the responsibility of inventing a system which was not generally known and practised. The evidence of Mr. Pelte that he had no personal knowledge of the contre lettre, could only be disbelieved on the assumption that he had committed deliberate perjury—which we cannot for a moment entertain or imagine. Indeed the contre-lettre would not in the ordinary course of affairs have come before him any more that the acquittance of 31st October 1865, which he did not see until it was made a notarial deposit on the second of December. But then comes the question of the highest possible importance: whether the knowledge which is charged against the defendant in this declaration is necessarily limited to personal knowledge or whether it does not also include a knowledge by those in his employment, and for whom he is responsible, by those in short he uses and must use in an extensive business like his as a multiplication of his own personal means of knowledge for the discharge of more numerous professional duties and the obtaining thereby a greater increased professional remuneration.—As the evidence pointed to a knowledge of this latter kind, we allowed an amendment of the pleadings, to bring the point forward, for hearing and consideration —and we have heard parties fully thereupon.

It is not denied that Boullé wrote the contre lettre: the only point is whether he wrote it, in the fulfilment of his functions, that is did it come within those works of the Article 1,384 C. C. "Les maîtres et les commettants du dommage causé pas leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés"?.....

Mr. Pelte informs us in his evidence that Boullé had busied himself with his knowledge and in his office with the affairs of Gautier, Letellier and Clement. A series of notarial documents are the result of what he arranged as Mr. Pelte's clerk with Mr. Pelte's knowledge and sanction and Mr. Pelte obtained the professional fees which resulted from these arrangements made by his clerk. It is said that the documents which came to Mr. Pelte's knowledge (with the exception of the acquittance) were notarial acts for which he is responsible but that for the contre-lettre which shewed that the notarial deeds were not according to the fact, he is not responsible, both because he did not know of it and because it was not within the functions of Boullé to draw such a document.

Two points arise here which must be viewed separately. The defendant's assertion that he is not responsible for damage caused by the notarial acts because so far as his knowledge went they were genuine does not cover of the whole of that part of the case. These is no doubt that Boullé was acting within his functions in arranging for, and in making those notarial acts, or getting them made in the office by others, and if he knew at the time that they did not express the truth, what then would be Mr. Pelte's liability? It is the notarial acts which constituted the damage here and not the contre-lettre which was the expression of the truth, and when notarial acts are made the notary must be held responsible whether he knew the whole transaction intimately himself or for the moment, and for the particular piece of business departed another with his functions. But the contre-lettre written by Boullé's own hand taken in connection with the whole of the evidence, is sufficient to shew that Boullé, knew all along where the truth lay, and if Mr. Pelte trusting to him, did not personally superintend the buiseness or fully inform himself of what was in progress, that is, we fear, only one of the risks which professional men run and for which they are responsible when they employ clerks in this manner and especially when they permit clerks to act with their sanction as Boullé acted here for a variety of persons having different and conflicting interests. From what I have already said however it will be evident that I consider the case one where a very small amount of attention on the part of the notary would have shown him the whole nature of the transaction as clearly as if the contre-lettre had been the first document put under his eyes.

Then, as to the other point assuming that it was the drawing of the contre-lettre which was the fraud, the fact being admitted that it was written by Boullé who was not merely a "*préposé*" in the general sense of being an experienced clerk in the Notary's office, accustomed and permitted to receive instructions from clients, at least to a certain extent but a "*préposé*" in the special sense, that the business of Gautier, Clément and Letellier was committed to his care, it is not possible to hold that the notary's responsibility goes no farther than his personal knowledge. Mr. Pelte himself accepts the responsibility of the acquittance given to Gautier to his wife although he knew nothing of it at the time it was made and although it is just as delusive as the other deeds.

This illusory charge was accepted by Mr. Pelte as a notarial deposit and therefore brought to his knowledge on the 2nd December, and the definitive mortgage to Letellier was granted on the 29th December. On the 18th of November the sub-guardian of the minors had employed Mr. Pelte to take an

inscription to guard their rights, when the whole designs of Gautier in relation to the Curepipe property must have been apparent; but Mr. Pelte permitted the series of deeds to be completed, and neither interfered then nor afterwards when there might still have been time to prevent the evil results of the course of dealing to which Boullé acting in his capacity as Pelte's clerk had given his assistance.

We have had under consideration various cases reported in the books, of decisions of the French Courts as to the responsibility of notaries for the acts of their clerks, but as is generally the case when the result depends so entirely upon the view which the Court may take of the facts, we do not get very much light or assistance from these decisions. We do however see that the French Courts have never had any hesitation in holding Notaries responsible where things causing damage to others were improperly done by those in the Notary's employment, when acting within their functions, and I have no doubt here that Boullé was so acting—was acting very much to quote an expression from one of these decisions as the "*alter ego*" of the notary in the business in question and that his acting amounted to the fraud laid in the declaration. I do not see anything in the position of Mr. Pelte relative to the case, which could induce me to hesitate to hold him responsible in such circumstances. The transaction bears its character on its face and its nature might have been apparent to any professional man of ordinary sagacity who had troubled himself to look into it. The explanation given by the notary of what he understood the wishes of Madame de Terrasson to be in the matter would not have been sufficient for any one grvaly conducting business and the looseness of the evidence as to when these alleged explanations were made leave it entirely in doubt whether any such reasons were ever given by the Lady in question. Mr. Pelte was acting through means of his clerk Boullé, for a variety of persons whose interests were by no means identical.

Madame de Terrasson's wish if it were really expressed, to give a benefit to one of her children being very different from the desire of Clement and Letellier to be ranked in Gautier's funds in a preferable rank to his children with whose monies Gautier had been intromitting and for which at the conclusion of his guardianship he was unable to account. The mode adopted by the notary to give effect to Madame de Terrasson alleged wish was not the natural and straight forward way of doing so, but a conveyancing manœuvre was adopted by which Clement and Letellier were enabled to get hold of land acquired by funds nominally those of Gautier to the exclusion of the legal Mortgage of the children to whom the funds really belonged. I am glad to think I am able te acquit Mr. Pelte of personal knowledge of the making of the contre-lettre but I do not see that that can alter his legal responsibility in this case when it was actually written by his "preposé" to whom he had consided the conducting of these transactions which are of such nature from first to last, that the contre-lettre is only the expression of a truth which may be detected from the whole series of deeds.

Such is the opinion which seems to me to be most in consonance with the justice of the case, and I accordingly give my voice for judgment for Plaintiffs in terms of the Declaration—with costs.

Jud. of His Honor Mr. Justice Bestel.

In this case the plaintiff Mrs. Rampant claims damages from the defendant for a wrong she alleges to have suffered from the defendant in his official capacity of notary public.

The wrong complained of is fully set out in the declaration, and the defence of the defendant will be found in the several pleas filed by him in answer to the charges of the declaration.

I will therefore merely refer to the conclusion of the declaration for the purpose of making intelligible my remarks on the whole case.

The conclusion is that the defendant Stanislas Pelte knew at the time he drew up the aforesaid documents (in the declaration mentioned) by which rights were conceded to third parties by the late wife (the 2nd wife) of Lamber Fabius Gautier in or on the land aforesaid of 342 acres or part thereof that the contre-lettre (in the declaration mentioned) was in existence.

That it had been drawn up by a clerk of Pelte under instructions from the latter and in his, Pelte's office, for whose clerks doings he was responsible—that the contre-lettre clearly shewed that the property belonged to Lambert Fabius Gautier personally and that the plaintiff had a legal mortgage on it, that Pelte having himself had an inscription taken thereon at the office of the conservator of mortgages to secure the said legal mortgage on the immoveable property of the said Gautier and having had the domicile of the plaintiff as regards the said mortgage elected in

his own office, the defendant was bound to do nothing to defeat the said inscribed mortgage or its effects.

That by drawing up as a notary public the aforesaid deeds under the above circumstances and making therein the false statement that the aforesaid property belonged to the late Marie Eugénie de Terrasson, the wife of the said Lambert Fabius Gautier, the defendant did wilfully and knowingly aid the said Lambert Fabius Gautier and his wife in the perpetration of the fraud whereby the plaintiff was deprived of the means of obtaining payment of her legal rights, and did wilfully and knowingly commit a breach of his duty whereby he had made himself responsible for the prejudice which the said plaintiff has suffered; and valued by her, the said plaintiff, at the sum of $6492.64 for which amount she prays judgment against the defendant with all costs of suit.

JUDGMENT.

The point of law before the Court is whether the defendant is answerable to the plaintiffs for the acts of his clerk Léon François Boullé, who has drawn up the contre-lettre between Mr. & Mrs. Gautier.

In the contre-lettre I find the following statement that "although Mrs. Gautier was the apparent purchaser and owner of the land at "Curepipe" n'ai acquis cette portion de "terrain que pour le compte du dit sieur "Gautier mon mari qui en est seul propriétaire."

Say that this contre-lettre was drawn in the office of the defendant and at one and the same time as the deeds of mortgage in the declaration mentioned, or at a subsequent date and assuming the effect of that instrument to have defeated the rights of the plaintiff as alleged, this would be insufficient to fasten any liability on the master and employer of the clerk unless it were shewn at the same time that the instrument was so drawn by the clerk on the orders and instructions express or implied of the employer with the criminal and fraudulent intention and purpose on the master or employer's part of defeating the plaintiff's just rights.

"The liability of the principal to third "person is founded on the maxim of Roman "Law "Qui facit per alium, facit per se;" "namely that the agency of a servant is but "an instrument and that any one having au"thority over the actions of another who ei"ther expressly commands him to do an act "or puts him in a condition of which such "act is the result or by the absence of due "care and control (either previously in the "election of a servant, or immediately after "in the act itself) negligently suffer him to "do an injury shall be responsible for the act "of his servant as if it were the act of him"self." Art. 1382 to Art. 1386 of our Civil Code are so many instances of liability on the part of principal to third parties. The rule laid down in those articles are so many illustrations of the Roman Rule above referred to. "But we must never lose sight of the "fact that the servant is the deputy of the "master *only within the limits* in which he "is employed,—but the master is not respon"sible for any act of his servant, which "makes *no part* of or *connexion with his ser"vice* and which he might or would have "committed *without service* such acts being "*contemporary only with* his service but *not* "*any result from it.* For example, if my "coachman drive over the leg of another "man; I am responsible for the injury; but "if he get off his coach box and horse-whip "a man in the street, it is his act and not "mine. It is nothing which I could foresee "or prevent, it is not the result of character "or the absence of any proper quality which "I ought acting with any ordinary discretion "to have required of a driver. The *injurious* "*act* for which the master is responsible *must* "*be* something *growing out* of the particular "service and be committed *quatenus in servi"tio.*" (Story on Agency, Note p. p. 408, 409, 410.

Now did the drawing of the contre-lettre by Boullé, say in the notary's office form a part of or is in connection with his service or ordinary duty as a clerk of the defendant? The evidence establishes, it is true, that Pelte had given instructions to Boullé to draft the deeds of mortgage from Mrs. Gautier to Clément and Letellier for the reasons mentioned by Pelte. Boullé went a step further and thought that in order to secure the right of the mortgages to a first rank mortgage it was necessary that Gautier should give an acquittance to his wife of her purchase price. Without this discharge from her husband, the land would have continued liable to Gautier's mortgage over the same, and the first rank mortgage to Clément and Letellier might have been defeated. It would therefore be no stretch of the rule of law to adjudicate that the end contemplated by parties requiring such an acquittance, the acquittance drawn up Boullé was an act growing out of the particular service assigned to him and had been done "*quotenus in servitio.*" The evident object of the acquittance was not to destroy but to affirm the mortgage deeds Boullé had been ordered to draw up. But the same cannot be said of the *contre-lettre* drawn up by Boullé. His instructions were to draw up the mortgage deeds between Gautier the wife and

certain of her husband's creditors so as to secure to those creditors a first rank mortgage on certain portions of the land at "Curepipe" any act drafted by him within the limits of his instructions must be binding on the notary. Any other act of Boullé such as the acquittance in furtherance of the end contemplated, must also be binding on his master who might be made responsible to third parties for any wrong which they might have experienced from the improper drafting of the notarial instrument. But has any evidence been adduced satisfactorily to shew that Boullé had any authority and instruction from his employer to draw up a contre-letter or any other instrument to undo what he had been ordered to do? The knowledge of Boullé of the fact of Mrs. Gautier not being the real owner of the land about to be mortgaged should have been brought to the notice of the defendant as soon as Boullé became aware of the fact, as it was necessarily to lead to a modification of his instructions or of fresh instructions to meet the difficulty presenting itself. But of this contre-lettre not a word was said by Boullé to the defendant who was made aware of its existence by Rampant the husband, long after the date of the several deeds in the declaration set forth, respectively dated 19th October and 29th December 1865 and 13th July 1868; that is to say at the end of 1873 or beginning of 1874.

There is no evidence contradicting Pelte's assertion that he had no notice of the conterlettre before the time mentioned by him. There is no evidence either that Boullé ever brought to his knowledge the existence of the contre-lettre. If so how could the notary who knew nothing of the state of things revealed by the contre-lettre, at the time be ordered the drafting of the mortgage deeds, be a participator in the fraud alleged to have been intended by Gautier to the prejudice of his own children. Why, forsooth, because from the account given of his guardianship by the father to his daughter the plaintiff, in presence of Pelte, the latter was made aware that the father was indebted to his child in a large sum of money? What of that? It it a duty cast by any Colonial Law upon a notary to see that the sum due by the guardian be properly secured? No,—but this nevertheless Pelte should have done it has been affirmed, knowing as he did the guardian then to be an insolvent.

Whatever may be surmised as to the insolvency of Gautier, I find no evidence to shew that at the time of the drafting of the mortgage deeds Gautier the father and guardian was insolvent, and that his insolvency was then known to Pelte. Further there is no proof that the monies laid out by Gautier on Mrs. de Terrasson's estate formed any part or portion of the monies belonging to his children.

Why should Pelte be found fault with for having acted the part devolving upon the subguardian in this as in every other tutelle. On being called upon a certain occasion by the sub-guardian in 1865 to secure the rights of the minors Gautier by an inscription to that effect he has in duty bound lost no time in doing so. True it is, that this inscription was taken on 18th November 1865 after the mortgages given by Mrs. Gautier, whom the notary had every reason at that time to believe to be the true owner as will now fully appear hereafter. No blame can attach itself to the notary for not having inscribed the claim of the minors so as successfully to protect the rights of the latter. He lent his professional assistance to the sub-guardian as soon as called upon to do so, and unfortunately for the minors the call upon the notary was made at too late an hour by the sub-guardian. But this fact is not the act of the defendant. Why should he be made responsible for the sub-guardian's laches if any?

There was nothing on the contract of Mrs. de Terrasson and her daughter to arouse the notory's suspicions as to the illegality or immorality of the transaction between mother and daughter and son-in-law. Pelte was never advised with as to the propriety of the transactions but merely called upon to record the conventions of parties, which on the face of them betrayed no illegality or immorality. This call he obeyed. Is he now to be blamed for not having given advice when no advice was asked for and for having obeyed a peremptory call to put into writing a convention neither illegal nor immoral? Surely not! The advantage which Mrs. de Terrasson was anxious to secure to her daughter viz: of the surplus of the land after paying Gautier claim ought, we have been told, to have been a warning to Pelte and should have let him to inquire more deeply into the reason of the advantage intended to be made to Mrs. Gautier by her mother to the prejudice of her other children. But why assume that Mrs de Terrasson ever intended any such undue advantage to Mrs. Gautier at the date of the sale. Has any one of her heirs or representatives ever criticised the sale made by her to her daughter Mrs. Gautier. Their silence up to this day clearly shews that no prejudice was ever intended by their common mother and that in fact the sale made to her daughter has been attended with no prejudice to her other children. The defendant is next found fault with for not having deterred Mrs. de Terrasson from such sale unstamped as it is on its face with any illegality or immorality

and how was he to make sure that the sale to Mrs. Gautier was to have any influence for good or for evil over the rights of Gautier's minor children, the protection of whose interests was entrusted to the guardian who in this case chanced to be at the same time the fathers of the minors. Could, not only the notary, but any other man suspect a father to be a likely man at any time, wilfully, and knowingly to sacrifice the interest of his wards and children? I must not omit to add a statement of defendant corroborated as it is by the evidence of this 1st and 2nd clerks that no contre-lettre was ever drawn or allowed to be drawn in the defendant's office. Boullé himself cannot say where the contre-lettre was written by him, whether in the office of Pelte, or at his private residence and still less could he swear that he had received instructions from his employer for the drawing of such contre-lettre. The drawing up of such an instrument forms no part of the ordinary duties of a notary's clerk. Any stranger and outsider might write out a contre-lettre and is the notary's character to be affected by the doing of such outsider and are the deeds regularly passed before the notary to be affected by such an act.

Let it also be borne in mind that a contre-lettre should be made with the concurrence of all the parties to the contract. In this case we have before us a formal deed of sale from Mrs. de Terrasson to her daughter with the twofold view that her daughter should pay off Gautier's mortgaged claim on the land so sold and that the surplus if any should accrue to her daughter's benefit. Art. 1321 C.C. says that "les contre-lettres ne peuvent avoir "leur effet qu'entre les parties contractantes, "elles n'ont pas d'effet contre les tiers." The contre-lettre cannot in the present case shake the truth and bona fides of the sale by Mrs. de Terrasson to her daughter, she (the mother) not having been a party to the contre-lettre. If so the land sold by Mrs. de Terrasson was in law the property of Mrs. Gautier subject to the mortgage rights of her husband on the land. And Pelte in his ignorance of what had been done between Gautier and wife was fully warranted in dealing with the land sold to her as the property of Mrs Gautier in the way he did, especially when the aim of the conveyances by Mrs Gautier to Clément and Letellier was on her part of her husband mortgaged claim on the land sold to her so as to secure to herself the speedy enjoyment of any surplus which might accrue to her after payment to Gautier or his creditors or the amount due to her husband.

Again under the title "du contrat de mariage" we are told Art. 1394 C. C. "Toutes "conventions matrimoniales seront redigées "avant le mariage par acte devant notaire." Art. 1395. "Les conventions matrimoniales "ne peuvent recevoir aucun changement "après la célébration du mariage Art. 1396. "Les changements qui y seraient faits avant "cette célébration doivent être constatés dans "dans la même forme que le contrat de ma- "riage. Nul changement ou contre lettre "n'est au surplus valable sans la présence et "le consentement simultané de toutes les "personnes qui ont été parties dans le con- "trat de mariage Art. 1397. Tous change- "ments et contre-lettres même revêtus de "formes prescrites par l'article précédent se- "ront sans effet à l'égard des tiers, s'ils n'ont "été rédigés à la suite de la minute du con- "trat de marriage, et le notaire ne pourra, à "peine de dommage et intérêts des parties et "sous plus grande peine, s'il y a lieu, déli- "vrer ni grosses, ni expéditions du contrat "de mariage sans transcrire à la suite le "changement ou la contre-lettre.

These provisions shew still more distinctly the necessity of Mrs. de Terrasson's presence at the contre-lettre in order that it should be binding on her, her heirs and successors, she not having been a party to it, it follows that the contre-lettre is but an informal document which being moreover wholly unknown to Pelte when he was called upon to draw up the mortgage deeds from Mrs. Gautier to her husband's creditors, can in no wise entail any responsibility on his part.

For this and several other reasons abovestated I am clearly of opinion that there is no ground in law for the allegations and charges made by the plaintiffs against the defendant and that this action must necessarily be dismissed with costs.

Jud. of His Honor the CHIEF JUDGE.

In this action Mrs Louise Mathilde Gautier, the wife of Auguste Alexandre Rampant of Port Louis, with the autorization of her said husband, sued Mr Stanislas Pelte, notary public, in damages on the following grounds: The plaintiff averred that she is separated in property from her husband as shewn by her marriage contract passed before the defendant on 28th September 1857—That in the said act it is stated that the plaintiff's assets or property consisted among other things, of certain illiquid rights in the estate of her late mother, the former wife of Mr Lambert Fabius Gautier, viz: Marie Louise Félicie Gadret who died on 18th August 1854; that the precise amount was subsequently ascertained to be $ 16,660.22¢ by notarial deed, drawn up by the defendant on the 27th December 1867, in which the plaintiff accepted

the account of guardianship then furnished by her said father that of this sum the plaintiff has only received $ 3,550 having a balance due of $ 13.110.22¢ that for her share of the said balance, the plaintiff has, by law, a legal mortgage on all the immoveable property of her father and guardian which he might have held from the beginning of his guardianship, viz: 18th August 1854; that her said legal mortgage was transcribed on 18th November 1865, the plaintiff's domicile being elected in defendant's office.

That in fact the plaintiff's father was as far back as the 19th September 1865, owner of a piece of land, of 342 acres at Curepipe, which he purchased for the sum of $ 12,985.25¢ from Mrs de Terrasson, the widow of the late Mr Washington de Terrasson, as appears by notarial deed drawn up by defendant and his fellow notary, on the 19th September 1865, duly registered and transcribed, the said sale-price being payable to himself, on account of the mortgage claim he had on the property, for although the said deed purports to be a sale to the said late Marie Eugénie de Terrasson the wife of, and duly authorized by, the said Lambert Fabius Gautier, from whom she was separated as to property, yet the fact really was, that it was sold by the said Lambert Fabius Gautier, as appears by a private writing or "contre-lettre" signed by the said Gautier the wife, and dated in the year 1865 and registered on the 14th October 1870—the plaintiffs averring that as the whole price was to come to the said Lambert Fabius Gautier, on account of his claim on the land sold, the mortgage of the plaintiff would have affected or encumbered a property free from vendor's claims. That it results from the two acts above-mentionned that the plaintiff Rampant the wife had a legal mortgage on the said 842 acres of land, and she could have not paid on the sale price thereof, if the same had not been placed in the name of Gautier the wife, now deceased: That the object of the said Lambert Fabius Gautier and his wife now deceased, in placing the said property in the name of the wife instead of the husband, was to defeat the just rights of the aforesaid minor, which they effectually did, since the said property has now passed into the hands of "*bona fide*" third parties, whose rights the plaintiffs cannot attack and which rights arise from the following among other documents drawn up by the defendant, viz: 1o. A deed of mortgage consented to by the said Gautier the wife, now deceased, on the 31st October 1865, on behalf of Emmanuel Clement, for the sum of $ 10.458 secured on 100 acres out of the 342 acres. 2o. Two documents dated respectively the 19th October and 29th December 1865, setting forth an obligation by the aforesaid Gautier the wife on behalf of Onezime Letellier for the sum of $ 4000 and securred by way of mortgage on 100 acres out of the said 342 acres. 3o. Another act passed before Mr Theodore Sauzier and his fellow notaries public in Mauritius, on the 13th day of July 1868, containing sale by the aforesaid Gautier the wife to one Zise Boissard, the wife of Barthelemy Jules Piat and to Ferdinand Lecourt de Billot, which act is duly registered and transcribed, the whole sale-price to wit $ 3,500 being payable to the said Onezime Letellier.

That in consequence of the mortgage given to the aforesaid Emmanuel Clement 100 acres of the said property were seized and sold at the bar and awarded to the said Emmanuel Clement on the 29th March 1868, and the sale-price of which was $ 2000 payable to the said Emmenuel Clement, on account of the aforesaid mortgage. That the remaining 142 acres out of the 342 acres were sold one half to the said Alexandre Rampant, the remainder to the brother of the said Mrs Rampant to wit: Louis Nemours Gautier, to whom the said had been previously mortgaged by the said Mrs Gautier for the sum of $ 2,550, so that the plaintiff's can have no recourse upon it.

That the above rights to Clement Alexandre Rampant and the said brother of plaintiff were conceded to those third parties before the said contre-lettre became known to the plaintiff or her agent. That the said Lambert Fabius Gautier has no property wherewith to satisfy the claim of the plaintiff, and his wife Marie Eugénie de Terrasson has died leaving no property and therefore the fact that the plaintiff is deprived of all recourse upon the aforesaid portion of land has caused her damages to the amount of $ 6,492 and $ 64 which is the half of the value at which the said property could be sold, the other half being liable for the rights of her brother Louis Nemours Gautier who is also entitled to a legal mortgage of the same amount as that of the plaintiffs.

That the defendant Stanislas Pelte knew at the time when he drew up the aforesaid deeds by which rights were conceded to third parties by the late wife of Lambert Fabius Gautier in or on the land aforesaid of 342 acres or part thereof that the above-mentioned contre-lettre was in existence, that it had been drawn up by a clerk in his office for whom he was responsible, and under his instructions, that this property belonged to Lambert Fabius Gautier himself and that this plaintiff had a legal mortgage on it: that having himself had an inscription taken thereon at the office of the conservator of mortgages to secure the said legal mortgage on the

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